Litigation & Liberation

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Can litigation contribute to the liberation of oppressed individuals and their communities? Or is litigation antithetical to social movements seeking liberation? Social movement scholars have raised important critiques of litigation's efficacy as a tool for social change, questioning litigation's ability to deliver significant social reform and condemning the compromising effects that litigation may have on social movements. According to these critics, litigation is incapable of dismantling deep-seated social injustices and may deradicalize and professionalize social movements in ways that undermine their ultimate vision of a just world.

Drawing upon an in-depth case study, this Article is the first to explore these critiques in the context of the animal liberation movement, to which scholars of law and social change have paid little attention. The case study centers on an extensive litigation campaign to liberate animals from the Cricket Hollow Zoo, an unaccredited Iowa zoo, which confined hundreds of animals in inhumane and filthy conditions. This campaign offers important lessons for understanding the relationship between litigation and social movements generally and for understanding the role of litigation in the furtherance of animal liberation more specifically.

Although litigation alone cannot fully realize social movements' goals, critics have undervalued litigation's capacity to materially benefit exploited populations. The Cricket Hollow Zoo campaign demonstrates how litigation can have important benefits for movements and the communities they serve, both juridically (through court orders that change material conditions for exploited

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individuals) and extra-juridically (through public outreach that facilitates broader changes in social norms). I use the litigation campaign against the Cricket Hollow Zoo to explore questions about litigation and social movements, extending the existing literature to the underexplored context of animal protection and drawing lessons that can inform other social movements' uses of litigation towards liberatory ends.

INTRODUCTION

From 2008 until her liberation in 2019, Anna, a rhesus macaque monkey, lived in a small, dirty cage at the dilapidated Cricket Hollow Zoo in rural Iowa. With virtually nothing to do, Anna would pass the time staring off into space "in

a catatonic state" as one expert put it.[1] Inspection reports from the United States Department of Agriculture (USDA) described Anna sucking her toe and overgrooming her legs and back, "abnormal behaviors" suggestive of "psychological distress."[2] Before her captivity at the zoo, Anna lived at a biomedical research facility, the stress of which caused her to compulsively pick at her left middle finger so much that it had to be partially amputated.[3] Although macaques in the wild typically live in large social groups, Anna had the companionship of just one other member of her species at the zoo, an elderly and gregarious monkey named Mrs. Wilkin.[4] For years before Anna's arrival, Mrs. Wilkin was held in solitary confinement, developing mental health issues and chronic pain from her neglect.[5] Anna and Mrs. Wilkin languished at the Cricket Hollow Zoo for over a decade, alongside Cynthia, a self-mutilating capuchin monkey; Obi, a solitary young baboon taken from his mother; and hundreds of other individuals of various species.[6]

Today, Anna lives in a naturalistic enclosure at the Born Free Primate Sanctuary in southern Texas, cared for by humans whose highest priority is her well-being.[7] Although she still exhibits the marks of her lifetime of trauma, her life has changed significantly. Mrs. Wilkin, too, got to experience life at the sanctuary before her recent death.[8] She and Anna spent their time grooming each other, eating fresh fruits and vegetables, and "when they [were] feeling bold, shouting at their next-door neighbors, Taz and Connie."[9] Anna now lives with Lucy, a young Japanese macaque, "quietly foraging and sitting in the sun."[10]

The catalyst for this dramatic transformation in the day-to-day lived experiences of Anna and Mrs. Wilkin, along with hundreds of other animals freed from the Cricket Hollow Zoo, was an aggressive litigation campaign led by the Animal Legal Defense Fund (ALDF) in collaboration with animal protection activists Tracey and Lisa Kuehl. ALDF's campaign against the Cricket Hollow Zoo illustrates the animal protection movement's use of litigation as a tactic. The litigation, comprising six lawsuits against private and

1. Supplemental Expert Report of Valerie Johnson, DVM, Kuehl v. Sellner, No. 01281 EQCV008505 (Iowa Dist. Ct. Oct. 14, 2019).

2. ANIMAL & PLANT HEALTH INSPECTION SERV., USDA, INSPECTION REPORT 269131322160528 2 (2013) (on file with author).

3. Email from Jessica Blome, Attorney, Greenfire L., to author (June 29, 2022) (on file with author).

4. *See* Born Free USA, *Welcome Mrs. Wilkin, Anna, Marlin, Violet, and Presley!*, ANIMAL ISSUES DIG. (Spring / Summer 2020), https://issuu.com/bornfreeusa/docs/bfusa31_mag_spgsmr2020-11_web/s/10526131.

5. *Id.*

6. *Id.* at 1, 25–27.

7. *See* Born Free USA, *supra* note 4.

8. Liz Tyson, *Mrs. Wilkin A Legend in Her Own Lifetime*, BORN FREE USA (Apr. 30, 2021), https://www.bornfreeusa.org/2021/04/30/mrs-wilkin-a-legend-in-her-own-lifetime/.

9. Born Free USA, *supra* note 4.

10. *Anna, the Mellow Sun-Bather*, BORN FREE USA, https://www.bornfreeusa.org/wp-content/themes/bornfree/assets/images/anna-adopt.html (last visited Jan. 24, 2022).

governmental defendants, provides an important opportunity to explore the relationship between law, liberation, and social change.

I use the term "liberation" in this Article to refer to the substantive goals of social movements concerned with egalitarianism, equity, social justice, liberty, individual autonomy, and cultural and political self-determination. Liberation movements oppose inequitable hierarchies, domination, and systematic oppression, including what Iris Marion Young termed the "five faces" of oppression: exploitation, marginalization, powerlessness, cultural imperialism, and violence.[11] This conception encompasses social movements fighting for the liberation of women, people with disabilities, Black people, Indigenous people, Latinx people, Asian people, Arab people, Queer people, the Earth, and animals, among others.

Each of these social movements is unique, with concerns and analyses that are particular to their struggles.[12] Nevertheless, each is guided by the belief that the community on whose behalf they agitate is entitled to justice and that the current social distributions of power fail to deliver justice. Likewise, the animal protection movement argues that animals are entitled to justice (by virtue of, variously, their sentience, their cognition, their autonomy, their capabilities, or due respect for their alterity) and that our current treatment of animals is unjust in that it subjects animals to systematized exploitation, domination, and oppression.[13] Although we should be wary of simplistic accounts of animal liberation that conflate animals with oppressed humans and flatten important historical and analytical differences,[14] we should also avoid the anthropocentric humanism that denies animals their due place in struggles for justice and liberty.[15]

This Article asks whether litigation can be an effective strategy for social movements seeking liberation and, if so, in what ways and under what conditions. To what extent does litigation promote the goals of liberatory social

11. IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 39, 48–63 (1990).

12. *See, e.g.*, anneke dunbar-gronke, *The Mandate for Critical Race Theory in This Time*, 69 UCLA L. REV. in DISCOURSE, LAW MEETS WORLD 4, 10–11 (2022) ("[T]he Black liberation movement has distinct goals and needs and, consequently, . . . generic movement lawyering, alone, is insufficient to serve those goals. Indeed, not all movements have the same goals and different movements have different needs.").

13. *See* Martha C. Nussbaum, *Beyond "Compassion and Humanity" Justice for Nonhuman Animals*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 299, 307–309 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004); Lori Gruen, *The Faces of Animal Oppression*, *in* DANCING WITH IRIS: THE PHILOSOPHY OF IRIS MARION YOUNG 168–69, 171–72 (Ann Ferguson & Mechthild Nagel eds., 2009). *See generally* ROBERT GARNER, A THEORY OF JUSTICE FOR ANIMALS (2013); Robert C. Jones, *Animal Rights is a Social Justice Issue*, 18 CONTEMP. JUST. REV. 467 (2015).

14. *See* Luis C. Rodrigues, *White Normativity, Animal Advocacy, and PETA's Campaigns*, 20 ETHNICITIES 71, 71 (2020).

15. *See* Claire Jean Kim, *Moral Extensionism or Racist Exploitation? The Use of Holocaust and Slavery Analogies in the Animal Liberation Movement*, 33 NEW POL. SCI. 311, 333 (2011); CLAIRE JEAN KIM, DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE 196 (2015); Aph Ko, *Why Animal Liberation Requires an Epistemological Revolution*, *in* APH KO & SYL KO, APHRO-ISM: ESSAYS ON POP CULTURE, FEMINISM, AND BLACK VEGANISM FROM TWO SISTERS 88 (2017).

movements, and how might it undermine their radical potential? Such questions are difficult, if not impossible, to answer in the abstract. Only by analyzing and evaluating individual campaigns and case studies—with appropriate attention to nuance and context—can we come to a clearer understanding of what litigation can and cannot accomplish and how it affects different social movements.

This Article argues that litigation, when deployed critically and strategically, can have important material and cultural benefits for social movements. The Cricket Hollow Zoo campaign vividly demonstrates litigation's positive direct and indirect effects. At the same time, the case study illustrates some of the risks and limits of relying on legal tools to achieve social change.

Very little scholarship has investigated the efficacy of litigation in the animal protection context or asked how the experience of animal protection litigators might inform broader discussions about law and liberation.[16] Through an in-depth case study of the Cricket Hollow Zoo litigation campaign, this Article seeks to provide critical lessons for both the understudied animal protection movement and for social movement theory more generally. Exploring the efficacy of litigation through the experiences of the animal protection movement offers an opportunity to evaluate critiques of litigation using an underexplored area of public interest lawyering while generating new insights into the relationship between law and social change. More than simply applying existing scholarship on litigation and social change to a new context, this Article extends that scholarship by exploring how the lessons drawn from animal protection litigation are broadly relevant to scholarship about social movement litigation.

One such lesson is litigation's ability to directly transform the lived experiences of oppressed individuals like Anna and Mrs. Wilkin. Debates in the social movement literature have largely focused on whether litigation accomplishes large-scale social change and, if not, whether it might still be worthwhile for its indirect effects on movement mobilization.[17] While these elements are important, they risk undervaluing or overlooking litigation's potential to directly contribute to the liberation of individuals in discrete cases. Specifically, the Cricket Hollow Zoo campaign illustrates the capacity of

16. One significant exception to the dearth of law and society scholarship on the animal protection movement is Helena Silverstein's groundbreaking research, which remains insightful, relevant, and significant. *See generally* HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT (1996); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements" A Relational Analysis of Social Movement Lawyers in the United States*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998). The present work updates Silverstein's research, which was based on litigation and interviews that are more than thirty years old, to account for the explosive growth of animal law in the last few decades and the tactical and doctrinal shifts in animal protection law. SILVERSTEIN, *supra*, at 23 (interviews conducted in 1990). Another important contribution to the question of litigation's efficacy for animal law is the work of Steven Tauber, which approaches the issue quantitatively. *See generally* STEVEN C. TAUBER, NAVIGATING THE JUNGLE: LAW, POLITICS, AND THE ANIMAL ADVOCACY MOVEMENT (2016). This Article augments Tauber's analysis with a detailed case study of a particular litigation campaign, while asking somewhat different questions and responding to different concerns.

17. *See infra* Part IV.A.1.

litigation to accomplish deeply meaningful changes in the daily lives of individuals, like the hundreds of animals rescued from the zoo, even setting aside whether it can produce significant social reform or substantially contribute to movement mobilization. This Article also extends the existing literature on litigation's direct benefits by describing how impact litigation can set precedents that amplify a single case's discrete material benefits, extending legal protections to new sets of facts and solidifying progressive statutory interpretations. As discussed below, animal protection lawyers have deployed the precedent established in the Cricket Hollow Zoo litigation and related cases to challenge a range of abusive practices at roadside zoos, from the social isolation of primates to the mutilation of big cats.

The case study also illustrates how litigation's extra-juridical consequences can further social movements' goals. Through an evaluation of the public messaging that surrounded the Cricket Hollow Zoo lawsuits, this Article explores how litigation can contribute to public awareness of movement grievances. The press coverage of the Cricket Hollow Zoo litigation drew public attention to this dilapidated roadside zoo in Iowa and allowed activists to interrogate captivity more generally and argue for broader reforms. This Article emphasizes the ability of litigation to highlight positive visions of social justice and flourishing, as well as the importance of appealing to affective and emotive responses to injustice. It also explores, through the words of the plaintiffs, how litigation can be empowering for its participants.

Finally, this Article engages the well-founded concerns of critics who question the utility of litigation. One concern of such critics is that litigation is ineffective because of judicial hostility to progressive reform and because of the difficulties enforcing and implementing litigation victories.[18] While conceding the importance of these critiques as a corrective to the excessive optimism of legal liberalism, I argue that litigation nevertheless can make significant contributions to social movements. The case study here illustrates how implementation problems can indeed mitigate the success of social movement litigation—the rescue came too late for Cynthia and Obi, who died at the zoo. But these shortcomings should not overshadow successes, as evidenced by the liberation of Anna, Mrs. Wilkin, the hundreds of other animals liberated from the Cricket Hollow Zoo, and the many animals that will benefit from the campaign's legal precedents in the future.

Critics also argue that litigation is counterproductive because it diverts the resources of social movements from more effective approaches and coopts social movements by deradicalizing their message.[19] However, the case study here demonstrates how litigation resources are not zero-sum with other movement tactics and can support alternative mechanisms of social change. In analyzing the potential of litigation to coopt social movements, I acknowledge the dangers of

18. *See infra* Part II.A.
19. *See infra* Part II.B.

articulating demands for liberation through the frameworks of the current legal system, compromised as it is. But social movements can embrace multifaceted approaches to social change, using litigation tactically while continuing to articulate their positive vision of liberation through other channels outside of the constraints of the existing legal order.

Ultimately, this case study illustrates the tangible, liberatory possibilities of litigation, while at the same time grappling with the critiques of litigation as an ineffectual and demobilizing tactic for activist groups trying to change society and defend embattled communities. To be clear, the claim made here is not that litigation is the *primary* pathway to liberation, for animals or for humans.[20] Litigation cannot replace the hard work of social and structural transformation. But the Cricket Hollow Zoo campaign illustrates how litigation can be a powerful tool for accomplishing movement goals, both directly and indirectly.

I also acknowledge that we should be modest and humble about extending lessons from one movement to another: each form of oppression has its own history, context, and uniqueness, as does each form of resistance to that oppression. Nevertheless, as scholars like Maneesha Deckha have illustrated, systems of oppression, including those constructed through species difference, are co-constitutive and mutually reinforcing, so our analysis of and resistance to them must be complex, intersectional, and coalitional.[21] As such, I strive to be trans-substantive but humbly context-specific, suggesting lessons for social movements generally but not prescribing their courses of action.

I note that I was a staff attorney for ALDF when the litigation discussed in this Article commenced (although I was not an attorney of record), and I later supervised the cases when I became ALDF's Director of Litigation. I acknowledge that my proximity to the litigation could bias my analysis of its efficacy. Nevertheless, my situatedness within the animal protection movement may also provide unique insights and nuances that are not available to an external observer. As Amna Akbar, Sameer Ashar, and Jocelyn Simonson have urged, progressive scholars should work in solidarity with social movements as collaborative partners in praxis, rather than treating movements as mere objects of study.[22] As such, my goal here is not to defend litigation per se but to evaluate

20. A similar point is made by anneke dunbar-gronke in their analysis of the relationship between legal strategies and Black liberation struggles: "The law itself will never bring about genuine change and should never be considered the only source of support for liberation, but it can be useful for certain strategic and temporary wins. This assessment distills the important distinction between using legal interventions as one point within a constellation of tactics moving the needle toward Black liberation versus working for legal wins for their own sake." *See* dunbar-gronke, *supra* note 12, at 16.

21. Maneesha Deckha, *Intersectionality and Posthumanist Visions of Equality*, 23 WIS. J.L. GENDER & SOC'Y 249, 249 (2008).

22. Amna A. Akbar et al, *Movement Law*, 73 STANFORD L. REV. 821, 826 (2021) ("Movement law approaches scholarly thinking and writing about law, justice, and social change as work done in solidarity with social movements, local organizing, and other forms of collective struggle.").

the efficacy of this particular legal tool and assess its capacity to further the goals of social movements.[23]

This Article proceeds as follows: Part I describes the growth of the animal protection movement since the 1970s and the importance of civil litigation to its strategy for social change. Part II describes critics' assertions that litigation is an ineffective and counterproductive social movement tactic. Part III presents the case study of the Cricket Hollow Zoo litigation campaign, with a detailed discussion of the lawsuits and their outcomes. Finally, Part IV situates the case study in the context of the critical literature on law and social movements, evaluating the lawsuits' juridical and extra-juridical benefits and shortcomings. This analysis concludes that litigation can have significant liberatory effects that further social movements' goals, at least in some circumstances.

I. THE ANIMAL PROTECTION MOVEMENT

In the 1970s, a new social movement began to take shape: advocating for the liberation of animals.[24] The movement grew out of the New Left's broad critique of instrumentalization—the tendency of capitalist society to objectify humans, animals, and the environment by reducing them to their functional productive value.[25] Of course, concern about humans' treatment of animals existed long before the 1970s.[26] But the prevailing ethos prior to the 1970s was one of "animal welfare," which takes for granted humans' right to use animals for whatever purposes we see fit—food, labor, transportation, research, and entertainment—so long as we prohibit gratuitous or antisocial cruelty.[27]

23. I should also emphasize that my praise for the strategic virtues of the Cricket Hollow Zoo campaign and for the tactical sophistication of individual ALDF attorneys should not be interpreted as an unqualified endorsement of ALDF as an organization. This Article aims to recognize the contributions of mission-driven attorneys and activists in producing meaningful litigation victories for animals rather than to lionize ALDF as a model of liberation-centered movement lawyering.

24. JAMES M. JASPER & DOROTHY NELKIN, THE ANIMAL RIGHTS CRUSADE: THE GROWTH OF A MORAL PROTEST 5 (1992).

25. *See id*. at 21–22. On the critique of instrumentalization, see MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT: PHILOSOPHICAL FRAGMENTS 206 (Gunzelin Schmid Noerr, ed., Edmund Jephcott trans., 2002).

26. *See* Claire Priest, *Enforcing Sympathy Animal Cruelty Doctrine After the Civil War*, 44 LAW & SOC. INQUIRY 136 (2019); David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. COLL. L. REV. 1 (1993). *See generally* DIANE L. BEERS, FOR THE PREVENTION OF CRUELTY: THE HISTORY AND LEGACY OF ANIMAL RIGHTS ACTIVISM IN THE UNITED STATES (2006). Of course, long before the anti-cruelty movements of the 1800s, indigenous ethical systems promoted respect for the nonhuman world. Pre- and post-colonial indigenous cosmologies, while incapable of homogenization, have generally been less dualistic than that of settler colonialism. *See, e.g.*, Sarah Deer & Liz Murphy, *"Animals May Take Pity on Us" Using Traditional Tribal Beliefs to Address Animal Abuse and Family Violence Within Tribal Nations*, 43 MITCHELL HAMLINE L. REV. 703, 704 (2017); Maneesha Deckha, *Unsettling Anthropocentric Legal Systems Reconciliation, Indigenous Laws, and Animal Personhood*, 41 J. INTERCULTURAL STUDS. 77, 78 (2020).

27. *See* Priest, *supra* note 26, at 154. *See generally* GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 32 (1996).

The emerging animal protection movement questioned the welfare paradigm's underlying assumption that humans are entitled to inflict suffering on animals for human ends.[28] Peter Singer's *Animal Liberation*, published in 1975, became the best-known example of a new ethic concerning animals, demanding the equal consideration of animals' interests.[29] Other philosophers, including Tom Regan, articulated a theory of animal rights, arguing that animals hold moral rights and cannot be used as means to human ends, no matter what benefits such use confers to humans.[30] Around the same time, ecofeminists critiqued the exploitation of animals using ethical frameworks focused on anti-oppression and care.[31] Taken together, these emerging strands of animal ethics and the militant organizations that espoused them constituted a new animal protection movement, gaining social and political traction in the 1970s and 1980s.[32]

Today, like most social movements, the animal protection movement contains a diverse—and sometimes conflicting—array of philosophical commitments, political goals, strategic objectives, and tactical approaches.[33] Philosophically, the movement includes those who believe animals have inalienable moral entitlements and those who believe humans may "respectfully use" animals under certain conditions.[34] Politically, some advocate for the total abolition of animal use, while others seek to minimize animals' suffering. Some seek to combine the two approaches, viewing reform campaigns as a stepping stone to liberation.[35] Strategically, some activists prioritize raising individuals' awareness of animal issues and encouraging personal consumption practices, while others focus on

28. *See generally* ANIMALS, MEN, AND MORALS: AN INQUIRY INTO THE MALTREATMENT OF NON-HUMANS (Stanley Godlovitch et al. eds., 1971).

29. *See generally* PETER SINGER, ANIMAL LIBERATION (1975). On the significance of *Animal Liberation* to the animal rights movement, see JASPER & NELKIN, *supra* note 24, at 90-91.

30. *See, e.g.*, TOM REGAN, THE CASE FOR ANIMAL RIGHTS xvi–xviii (1983).

31. CAROL J. ADAMS & LORI GRUEN, *Groundwork*, *in* ECOFEMINISM: FEMINIST INTERSECTIONS WITH OTHER ANIMALS AND THE EARTH (Carol J. Adams & Lori Gruen eds., 2014).

32. *See* SILVERSTEIN, *supra* note 16, at 32; BEERS, *supra* note 26, at 159; JASPER & NELKIN, *supra* note 24, at 26.

33. In this Article, I take a broad and inclusive view of the movement, using the umbrella term "animal protection movement," which includes those advocating for animals' welfare, rights, or liberation. Although there is value to investigating the sometimes bitter disputes among these factions, they constitute a collective social opposition to animal suffering and exploitation. *See* Lyle Munro, *The Animal Rights Movement in Theory and Practice A Review of the Sociological Literature*, 6 SOCIO. COMPASS 166, 170 (2012).

34. *Compare* REGAN, *supra* note 30, at xvi–xviii, *with* DAVID S. FAVRE, RESPECTING ANIMALS 27–28 (2018).

35. *See* GARY L. FRANCIONE & ROBERT GARNER, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION? (2010). *Compare* GARY L. FRANCIONE, ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION (2008), *with* Robert Garner, *Animal Welfare A Political Defense*, 1 J. ANIMAL L. & ETHICS 161 (2006). For critiques of the abolition/reform and rights/welfare dichotomies, see Jessica Eisen, *Beyond Rights and Welfare Democracy, Dialogue, and the Animal Welfare Act*, 51 U. MICH. J.L. REFORM 469, 471 (2018); Luis E. Chiesa, *Animal Rights Unraveled Why Abolitionism Collapses into Welfarism and What It Means for Animal Ethics*, 28 GEO. ENV'T L. REV. 557, 558 (2016).

system change, including corporate campaigns and law reform projects.[36] Tactically, the movement contains a range of methods, including legislative advocacy, litigation, undercover investigations, media campaigns, illegal direct action such as animal liberations and property destruction, boycott campaigns, and civil disobedience.[37]

This diversity notwithstanding, the animal protection movement is broadly concerned with alleviating animals' suffering while ensuring their capacity to flourish.[38] Accomplishing this goal requires sustained social, cultural, economic, and political change. These two objectives, improving the lives of animals and changing social norms concerning animals, constitute the core of the animal protection movement.[39]

Early in the movement's emergence in the 1970s, lawyers began to consider whether litigation could be a valuable tool for animal protection.[40] In her essential history of animal law, Joyce Tischler, founder of ALDF, describes the rise of "a large-scale, organized movement, which started in the early 1970s in the United States, spearheaded by attorneys and law students with the express purpose of filing lawsuits to protect animals and establishing the concept of their legal rights[.]"[41] This use of law differed from the legal animal advocacy that had preceded it in that these new animal lawyers "consciously considered animal-related legal issues from the perspective of the animal's interests . . . [and] began to view the animal as the de facto client[.]"[42] The movement used litigation not merely to stop discrete acts of animal cruelty but "to challenge institutionalized

36. *Compare* Jack Norris & Rania Hannan, *Leafleting and Booklet Effectiveness*, VEGAN OUTREACH, https://veganoutreach.org/leafleting-and-booklet-effectiveness/ (last visited July 7, 2021), *with* Kelsey Piper, *Want to Help Animals? Focus on Corporate Decisions, Not People's Plates*, VOX (Jan. 19, 2019), https://www.vox.com/future-perfect/2018/10/31/18026418/vegan-vegetarian-animal-welfare-corporate-advocacy.

37. Kay Peggs, *Animal Rights Movement*, *in* BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY 1, 2 (George Ritzer & Chris Rojek eds., 2020), https://onlinelibrary.wiley.com/doi/abs/10.1002/9781405165518.wbeosa051.pub3.

38. *See* Nussbaum, *supra* note 13, at 305.

39. *See* Elizabeth Cherry, *Shifting Symbolic Boundaries Cultural Strategies of the Animal Rights Movement*, 25 SOCIO. FORUM 450, 450–51 (2010); Lyle Munro, *Strategies, Action Repertoires and DIY Activism in the Animal Rights Movement*, 4 SOC. MOVEMENT STUDS. 75, 76 (2005).

40. Tischler considers Jones v. Butz, 374 F. Supp. 1284 (S.D.N.Y. 1974), filed in 1973, to be the first modern animal law case. Joyce Tischler, *The History of Animal Law, Part I (1972 - 1987)*, 1 STAN. J. ANIMAL L. & POL'Y 1, 4 (2008). The case unsuccessfully challenged the Humane Methods of Slaughter Act's allowance of kosher slaughter. *Jones*, 374 F. Supp. at 1285–86. The plaintiffs included animal rights activist Helen Jones, who the caption designated as "next friend and guardian for all livestock animals now and hereafter awaiting slaughter in the United States." *Id*. at 1284. *Jones* was the first case to include animals in the caption. Although the court did not address Jones' standing to represent the animals as next friend or guardian, this assertion of animals' legal subjectivity marks *Jones* as particularly significant.

41. Tischler, *supra* note 40, at 3.

42. *Id*. This shift away from animal welfare and towards legal rights was reflected in law review articles published by young law students (including Tischler herself) around this time. *See* Stephen I. Burr, *Toward Legal Rights for Animals*, 4 B.C. ENV'T AFFS. L. REV. 205 (1975); Joyce Tischler, *Rights for Nonhuman Animals A Guardianship Model for Dogs and Cats*, 14 SAN DIEGO L. REV. 484, 484–86 (1977).

forms of animal abuse and exploitation."[43] In 1978, Tischler and several other lawyers founded Attorneys for Animal Rights (AFAR) to create a legal organization to pursue litigation in furtherance of animal protection.[44] In 1984, AFAR renamed itself the Animal Legal Defense Fund, a nod to the NAACP Legal Defense Fund and the Mexican American Legal Defense and Education Fund.[45] As the name change evinced, the animal protection movement had embraced the model of other social justice movements in using litigation as a tool for social change.

Animal law has grown significantly since the 1980s, particularly in recent years.[46] Today, more than 150 law schools offer courses in animal law, compared to just nine law schools in 2000.[47] The demands and interests of law students have driven this growth.[48] The Association of American Law Schools now has a Section on Animal Law, and the American Bar Association has an Animal Law Committee.[49]

Major movement organizations, including People for the Ethical Treatment of Animals (PETA) and the Humane Society of the United States, have adopted the use of litigation, hiring staff attorneys and creating litigation programs.[50] ALDF now employs dozens of lawyers, many of them litigators.[51] The Nonhuman Rights Project exclusively uses litigation to work towards establishing fundamental legal rights of bodily liberty and autonomy for animals.[52] The animal protection movement has turned to litigation in every area of animal exploitation, including research, companionship, agriculture, and captivity.[53]

As a significant and growing social movement with large investments in litigation, the animal protection movement provides an ideal subject for analyzing the relationship between litigation and social change. But as Irus Braverman

43. Tischler, *supra* note 40, at 3.

44. *Id*. at 10.

45. *Id*. at 10 n.58; TAUBER, *supra* note 16, at 59.

46. *See, e.g.*, Pamela Frasch & Joyce Tischler, *Animal Law The Next Generation*, 25 ANIMAL L. 303, 336 (2019) (describing recent growth in animal law and new tactical priorities); Akisha Townsend, *An Opportune Quest The Development of Animal Law Courses in the United States*, 3 J. ANIMAL ETHICS 72, 72 (2013); Peter Sankoff, *Charting the Growth of Animal Law in Education*, 4 J. ANIMAL L. 105, 105–06 (2008).

47. *Animal Law Courses*, ANIMAL LEGAL DEF. FUND, https://aldf.org/article/animal-law-courses (last visited Dec. 22, 2022); Joyce Tischler, A Brief History of Animal Law, Part II (1985-2011), 5 STAN. J. ANIMAL L. & POL'Y 27, 36–37, 39 (2012).

48. Townsend, *supra* note 46, at 75.

49. *See Section on Animal Law*, ASS'N OF AM. L. SCHS., https://www.aals.org/sections/list/animal-law/ (last visited Dec. 22, 2022); Tort Trial & Insurance Practice Section, *Animal Law*, AM. BAR ASS'N, https://www.americanbar.org/groups/tort_trial_insurance_practice/committees/animal-law/ (last visited Dec. 22, 2022).

50. TAUBER, *supra* note 16, at 56–60.

51. *See Our Staff*, ANIMAL LEGAL DEF. FUND, https://aldf.org/about-us/our-staff/ (last updated Dec. 22, 2022); *Litigation*, NONHUMAN RTS. PROJECT, https://www.nonhumanrights.org/litigation/ (last updated Dec. 22, 2022).

52. *Litigation*, *supra* note 51.

53. *See generally* Tischler, *supra* note 40; Tischler, *supra* note 47.

notes, "[l]aw and society scholarship has tended to marginalize . . . animal law related inquiries."[54] The animal protection movement remains undertheorized, even though "the study of animal protectionism as a new social movement is potentially rich in the range of theories and perspectives available to scholars."[55] The following case study aims to fill this gap by evaluating how the animal protection movement's use of litigation contributes to theorizing the relationship between law and social change.

II. CRITIQUES OF LITIGATION

Before turning to the Cricket Hollow Zoo campaign to analyze its efficacy, a brief discussion of existing scholarship on the role of litigation in social movements is in order.

During the 1950s through the 1970s, social movements generally perceived the federal judiciary as an effective vehicle for challenging long-standing forms of discrimination against racial minorities, women, people with disabilities, criminal defendants, and other oppressed groups.[56] The Supreme Court in particular became instrumental to the social change strategies of various progressive social movements, which saw the Court as a forum for establishing new rights that would serve as a bulwark against majoritarian prejudices.[57] For example, the NAACP, starting in the 1920s, famously used incremental strategic impact litigation to chip away at *de jure* segregation, culminating in the Supreme Court's landmark 1954 decision in *Brown v. Board of Education* invalidating racial segregation in public schools under the Equal Protection Clause.[58] Similarly, the women's rights movement used litigation to attack the criminalization of abortion, with the Supreme Court recognizing a constitutional right to abortion under the Due Process Clause in *Roe v. Wade* in 1973.[59] Scholars have used the term "legal liberalism" to describe this court-centered approach to social change, through which lawyers pursue progressive policy change using constitutional and statutory litigation.[60] Legal liberalism places its

54. Irus Braverman, *Animals, in* ROUTLEDGE HANDBOOK OF LAW AND SOCIETY (Mariana Valverde et al. eds., 2021) (forthcoming).

55. Munro, *supra* note 33, at 166.

56. *See, e.g.*, Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993).

57. *See* Owen M. Fiss, *Foreword The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (describing structural reform litigation); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1669 (2017).

58. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954). *See generally* MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950 (1987).

59. Roe v. Wade, 410 U.S. 113 (1973).

60. *See generally* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1998); Cummings, *supra* note 57, at 1650–51.

faith in "an alliance of activist courts and activist lawyers working in concert to advance progressive political change."[61]

But the recent Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, overruling *Roe* and eliminating the constitutional right to abortion, draws into stark relief the dangers of social change strategies that rely on the judiciary.[62] *Dobbs* constitutes a dramatic example of judicial retrenchment and the limitations of using litigation to secure fundamental rights.

For decades, critics have expressed serious skepticism about the power of law to change society. Stuart Scheingold, a pioneer of the critique, challenges the "myth of rights," which links rights-based litigation with social progress, as "an oversimplified approach . . . that grossly exaggerates the role that lawyers and litigation can play in a strategy for change."[63] Similarly, Gerald Rosenberg refers to public interest litigation as a "hollow hope," a strategy for social change that "cloud[s] our vision with a naive and romantic belief in the triumph of rights over politics."[64] Scheingold and Rosenberg's cynicism about litigation's ability to change society has become "the orthodox view."[65] Among scholars, there is "a now-axiomatic skepticism about law's ability to produce social transformation."[66]

These critiques of litigation's efficacy generally focus on two central failures of litigation: first, that litigation is *ineffective* at changing society, and second, that litigation is *counterproductive* to social movements.[67]

A. Litigation Is Ineffective

In arguing that litigation is ineffective, critics identify both political and structural obstacles to the ability of law to deliver social change. Politically speaking, the courts are an inherently trepidatious and conservative institution, reliant as they are on the slow accretion of precedent, doctrines like *stare decisis*, and their ostensible commitment to judicial restraint.[68] Judges are acculturated

61. Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1558 (2017); *see also* William H. Simon, *Solving Problems vs. Claiming Rights The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 130 (2004).

62. *See* Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. at 5 (U.S. June 24, 2022).

63. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5 (2d ed. 2004).

64. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 429 (2d ed. 2008).

65. Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1931 (2007).

66. Orly Lobel, *The Paradox of Extralegal Activism Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 940 (2007).

67. *See, e.g.*, SCHEINGOLD, *supra* note 63, at 5–6; ROSENBERG, *supra* note 64, at 423.

68. *See* ROSENBERG, *supra* note 64, at 12 ("[c]onstrained by precedent and the beliefs of the dominant legal culture, judges, the Constrained Court view asserts, are not likely to act as crusaders."). For a discussion of the politics of judging in animal law cases and the challenges of convincing judges to rule in favor of animals, see Matthew Liebman, *Who the Judge Ate for Breakfast On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness*, 18 ANIMAL L. 133 (2011). Of

to an ideology that frowns on the kind of judicial progressivism that would generate new rights through acts of constitutional or statutory interpretation.[69]

Even if the courts were at one time politically receptive to the creation and robust enforcement of rights for vulnerable communities, as they arguably were during the "Rights Revolution" of the 1950s to 1970s, that time has long passed with the rightward shift of the judiciary in the United States over the last several decades.[70] With the plethora of new conservative judges appointed by President Donald Trump in recent years, the courts have become even more hostile to progressive law reform, an attitudinal shift that could last for decades.[71] The likelihood of courts handing down decisions that fundamentally challenge political power thus seems remote, as "legal processes are closely linked to the dominant configurations of power."[72] Derrick Bell has argued that, regardless of the Court's ideological makeup, progress for marginalized communities is possible only when their interests converge with the interests of those in power.[73] In Bell's analysis, *Brown* was less about the Court's recognition of the injustice of racial segregation and more about the need to project the illusion of equality to benefit white Americans, domestically and abroad.[74] Bell concluded, "the interests of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[75] When those interests diverge, the dominant class is unlikely to act against its own self-interest, and the prospects of progress become doubtful.[76]

The obstacles to social change through litigation are not only political, but also institutional. Assuming that public interest lawyers can overcome the hurdle of convincing judges to adopt their progressive interpretations of the law, critics point to structural limitations on the ability of the judiciary to effect change.[77] The courts are just one branch of government and "the least dangerous" one at

course, as *Dobbs* illustrates, conservative courts may buck these constraints when doing so furthers their ideological commitments.

69. *See, e.g.*, Austin Sarat, *Going to Court Access, Autonomy, and the Contradictions of Liberal Legality*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 97, 97 (David Kairys, ed., 3d ed. 1998).

70. *See* Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 37, 38 (Austin Sarat & Stuart A. Scheingold eds., 2006).

71. *See, e.g.*, Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 14, 2020), https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html.

72. SCHEINGOLD, *supra* note 63, at 204.

73. *See* Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). For an application of the interest-convergence theory to animal law, see Ani B. Satz, *Animals as Vulnerable Subjects Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65, 65 (2009).

74. *See* Bell, *supra* note 73, at 524.

75. *Id.* at 523.

76. *See, e.g.*, Derrick Bell, *The Space Traders*, *in* FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 158–94 (1992) (postulating through allegory that white Americans would trade away Black Americans to space aliens in exchange for their own economic benefit if given the chance).

77. ROSENBERG, *supra* note 64, at 15.

that.[78] Lacking the enforcement power of the executive and the funding power of the legislature, courts are functionally constrained in their ability to force compliance with their judgments.[79] Court decisions are not self-executing, and recalcitrant defendants often find ways to circumvent court orders.[80] Courts also lack the expertise, infrastructure, and resources to exercise long-standing supervision over defendants.[81] Moreover, court decisions that adopt progressive interpretations of statutes are also subject to legislative reversal, a particular threat when judicial decision-making gets too far ahead of public sentiment.[82]

According to the critics of litigation, then, the judiciary is hemmed in by both ideological and institutional constraints, and judges are therefore unlikely to deliver the kind of social change that progressive social movements seek.[83] Rosenberg concludes that "U.S. courts can almost never be effective producers of significant social reform."[84]

B. Litigation Is Counterproductive

If courts were merely ineffective at delivering the goods that movements seek, litigation would simply be a waste of time. But critics argue that litigation can also be dangerous for social movements. Tomiko Brown-Nagin describes law and social movements as "essentially antagonistic" with one another.[85] This antagonism manifests in several ways. Orly Lobel provides a typology of the various arguments for how litigation can coopt and harm social movements (although she does not herself subscribe to the critique). Lobel "unbundles" the progressive critique of the law's potential to coopt social movements into six related concerns: "resources and zero-sum energies," "framing and fragmentation," "professionalization," "institutional limitation," "crowding out,"

78. THE FEDERALIST NO. 78 (Alexander Hamilton).

79. *See id.* ("The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

80. *See* ROSENBERG, *supra* note 64, at 15.

81. *See id.* at 35, 52.

82. *See id.* at 14.

83. The federal judiciary's rightward turn and the rise of conservative public interest legal movements show that the courts are still actively responsive to social movement lawyering, just not in the direction that progressive critics want. *See, e.g.*, ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE MOVEMENT 1 (2008); Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698, 1698 (2018) (book review); Adam Liptak, *A Transformative Term at the Most Conservative Supreme Court in Nearly a Century*, N.Y. TIMES (July 1, 2022), https://www.nytimes.com/2022/07/01/us/supreme-court-term-roe-guns-epa-decisions.html.

84. ROSENBERG, *supra* note 64, at 422.

85. Tomiko Brown-Nagin, *Elites, Social Movements, and the Law The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1511 (2005). Brown-Nagin nevertheless acknowledges that "activists do and must utilize legal processes when necessary to advance their goals." *Id.*

and "legitimation."[86] Catherine Albiston raises similar and overlapping concerns, which she terms "the dark side of litigation."[87]

First, in instrumentalist terms, litigation is expensive and consumes large amounts of movement resources, both human and financial.[88] Such expenditures are an opportunity cost, diverting resources from other movement tactics, such as the direct provision of services to constituents, the pursuit of political campaigns, or engagement in direct action and public protest.[89] Allocating limited organizational budgets to filing fees, deposition transcripts, and attorneys' fees diminishes scarce and finite movement resources.

Second, litigation may harm movements by fundamentally altering their identities. Austin Sarat and Stuart Scheingold note the need to investigate not just what lawyers do *for* social movements, but also what they do *to* them.[90] While social movements aim to change the law, the law may end up changing social movements, recasting their identities in ways that are conformist, mainstream, and accommodating of the status quo. Engagement with litigation "requires a social movement to reformulate its claims and normative standing to fit into the legal world."[91] Critics of litigation—and legal engagement more broadly—argue that the turn to legal institutions threatens to deradicalize social movements by forcing them to reframe their articulation of the movement's grievances in ways that are cognizable by existing legal doctrines and dominant social values.[92] For example, radical critics have argued that the LGBTQ legal movement's focus on marriage equality and eliminating the military's "Don't Ask, Don't Tell" policies have sought to assimilate Queer people into two of the most conservative and oppressive institutions: the heteronormative nuclear family and the U.S. military.[93]

86. Lobel, *supra* note 66, at 948–58.

87. Catherine Albiston, *The Dark Side of Litigation As A Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 62 (2011).

88. Lobel, *supra* note 66, at 949.

89. MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 200 (1986).

90. Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements An Introduction*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 70, at 3.

91. Lobel, *supra* note 66, at 950.

92. Albiston, *supra* note 87, at 74 ("[L]itigation as a social movement tactic can deradicalize both the message and the objectives of a movement."); *see also* Tomiko Brown-Nagin, *supra* note 85, at 1510 ("Law is . . . the essence of a state-mediated process, one that privileges arcane language and expertise over the frames of reference familiar to laypeople.").

93. *See, e.g.*, Lisa Duggan & Richard Kim, *Preface A New Queer Agenda*, THE SCHOLAR & FEMINIST ONLINE (Fall 2011/Spring 2012), https://sfonline.barnard.edu/a-new-queer-agenda/preface/ ("The agenda of the mainstream organizations has shifted away from the broad array of issues facing queer populations to focus primarily on marriage, military, and markets. These goals align too neatly with those of social and economic conservatives: seeking to join rather than critique and contest the inequalities and injustices of the privatized family, the imperial state, and the neoliberal market."). *See also* Veryl Pow, *Grassroots Movement Lawyering Insights from the George Floyd Rebellion*, 69 UCLA L. REV. 80, 100–01 (2022).

Third, litigation may professionalize social movements, reinforcing a reliance on "respectable" and mainstream methods of resistance.[94] Lawyers, as "a closed network of elites," may "create[] dependency so significant that lawyers risk dominating the movement in which they operate."[95] In this way, litigation limits social movements' conceptualization of the possible solutions to movement grievances to those that conform to the menu of remedies that litigators are used to, such as monetary damages, court-ordered injunctions, settlement agreements, or consent decrees.

Fourth, as discussed above, the institutional limitations of the judiciary, especially gaps in implementation, undermine the value of litigation for social movements.[96] "[S]ocial movements that mobilize around legal cases quickly learn that even victories such as [*Brown v. Board of Education*] do not translate into significant material change."[97]

Fifth, litigation may "crowd[] out alternative paths" to social change, "substitut[ing], physically and emotionally, for other, stronger forms of social engagement."[98] Litigation may promote institutional legal actors within social movements at the expense of grassroots activists, overshadowing other means of social change.[99] In her case study of the relationship among LGBTQ organizations in Chicago, Sandra Levitsky found that professionalization and bureaucratization of legal organizations gave them disproportionate access to financial and social resources due to their elite connections to grant-making foundations and ability to liaise with the media.[100] This professionalism gave legal organizations an outsized role in determining the public agenda of the movement.[101] Although legal organizations provided tangible benefits to LGBTQ communities in Chicago, other activist organizations that focused on protest, community service, and cultural production perceived legal organizations as operating independently and without sufficient input from these other movement actors.[102]

Sixth, participation in litigation may legitimize the legal system as a whole, which, according to radical critics, distributes power in fundamentally unjust ways.[103] Critical legal scholars argue that the American legal system is beholden to social, political, and economic elites, who use the legal system to maintain

94. Lobel, *supra* note 66, at 952; Albiston, *supra* note 87, at 75.
95. Lobel, *supra* note 66, at 952–53.
96. *Id.* at 954.
97. *Id.*
98. *Id.* at 955.
99. Albiston, *supra* note 87, at 75–76.
100. Sandra R. Levitsky, *To Lead with Law Reassessing the Influence of Legal Advocacy Organizations in Social Movements*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 70, at 156–57.
101. *Id.*
102. *Id.* at 151–52, 155–56.
103. Albiston, *supra* note 87, at 76–77.

their power.[104] "[S]ocial actors who enter into formal channels of the state risk transformation into a particular hegemonic consciousness."[105] By participating in litigation, critics argue, social movements may offer legitimacy to the structures they ultimately seek to transform.[106] Scheingold argues that "the myth of rights can generate support for the political system by legitimating the existing order . . . [and] reassur[ing] us that the institutions of American politics will respond to just claims and that any mistakes that occur are not only aberrational but subject to the self-correcting devices built into the constitutional system."[107] Appeals to litigation therefore risk coopting movements into the very system they challenge.

A final way in which critics argue litigation is counterproductive is in the backlash it may engender.[108] When court decisions outpace public opinion, counter-movements may use them as a rallying cry for political mobilization. Litigation campaigns may succeed in changing the legally operative rules, but they might backfire by catalyzing the organization of cultural and political forces that can cause further harm to social movements. For example, Michael Klarman argues that *Brown* stoked white racial resentment in the South, leading to the further polarization of civil rights issues and the election of racist Southern politicians who continued to promote Jim Crow policies in the wake of the decision.[109] Similarly, critics have argued that the Supreme Court's decision in *Roe* "may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents."[110]

In sum, according to this critical view, not only does litigation not work at accomplishing the goals of social movements due to political and institutional constraints, it risks being counterproductive because it consumes resources that would be better spent on other forms of activism, deradicalizes activists and

104. *See, e.g.*, Invitation to First Conference on Critical Legal Studies (Jan. 17, 1977) ("[L]aw is an instrument of social, economic, and political domination, both in the sense of furthering the concrete interests of the dominators and in that of legitimating the existing order.") (quoted in MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 297 n.1 (1987)); Mari J. Matsuda, *Looking to the Bottom Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 327 (1987) ("[The Critical Legal Studies] movement is attractive to minority scholars, because its central descriptive message—that legal ideals are manipulable and that law serves to legitimate existing maldistributions of wealth and power—rings true for anyone who has experienced life in non-white America.").

105. Lobel, *supra* note 66, at 957.

106. *See id*.

107. SCHEINGOLD, *supra* note 63, at 91.

108. *See* ROSENBERG, *supra* note 64, at 425.

109. Michael J. Klarman, *How* Brown *Changed Race Relations The Backlash Thesis*, 81 J. AM. HIST. 81, 92 (1994). As Klarman notes, however, this backlash spawned its own dialectical response, as the harsh Southern backlash to *Brown* catalyzed the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. *Id*. at 82–83.

110. Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CAL. L. REV. 751, 766 (1991). *But see* Linda Greenhouse & Reva B. Siegel, *Before (and After)* Roe v. Wade *New Questions About Backlash*, 120 YALE L.J. 2028 (2011) (arguing that political realignments and cultural schisms over abortion were already underway well before *Roe*).

tames movement energy, dictates professionalized priorities, legitimizes the system of inequality it aims to fight, and catalyzes opposition.

The literature on litigation and social change has grown progressively more nuanced, and it is not simply a question of being "for" or "against" litigation.[111] Some scholars who doubt the instrumental utility of impact litigation nevertheless see value in litigation's ability to mobilize social movements, raise the profile of their grievances, and empower activists. Such scholars have "stressed the function of law in building movements and framing their claims."[112] Jules Lobel, for example, argues that lawyers might use courts as "forums for protest," such that a lawsuit's "most lasting legacy is not the relief ordered by the court, but the lawsuit's contribution to the ongoing community discourse about an important public issue."[113] Even some critics concerned with the negative constitutive effects of litigation nevertheless acknowledge its potential value. Albiston, who warns against the "dark side" of movement litigation, notes that "it does not necessarily follow that activists should abandon these strategies."[114] Instead, the value of litigation for social movements "should be assessed with the dark side in mind."[115] The Parts that follow aim to do that.

III. THE CRICKET HOLLOW ZOO CAMPAIGN

This Part describes in detail the campaign against the Cricket Hollow Zoo to set up the following Part's evaluation of the campaign's costs, benefits, and lessons for social movement litigation more broadly.

Why use the Cricket Hollow Zoo campaign to study the animal protection movement? First, the Cricket Hollow Zoo campaign was a high-profile, years-long project undertaken by a major movement organization, ALDF, on a topic central to the animal protection movement, the inhumane captivity of wild animals. Second, the Cricket Hollow Zoo series of cases blends numerous aspects and elements of animal protection litigation into a single campaign. The Cricket Hollow Zoo campaign involved state and federal litigation, raising both statutory and common law claims at the trial and appellate levels. The campaign also entailed a coordinated media strategy and an interface between local activists and a national nonprofit organization. The combination of these elements makes the Cricket Hollow Zoo campaign an ideal case study for investigating the function of litigation in the animal protection movement.

Admittedly, a case study cannot tell the full story of how the animal protection movement uses litigation and to what effect. By its nature, a case study is generally not able to provide empirical conclusions that are immediately

111. *See generally* Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360 (2018).

112. *Id.* at 381.

113. Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 480 (2004).

114. Albiston, *supra* note 87, at 77.

115. *Id.*

generalizable. But by drawing out appropriate lessons from a particular campaign, we can gain insights into how social movements use litigation to serve their goals. As Lisa Miller observes, "[o]ne of the most important and common uses of case studies is to generate, refine, question, or challenge extant theoretical frames."[116] I intend my analysis of the Cricket Hollow Zoo campaign to question, augment, and supplement theories about the relationship between law and social change and the consequences of litigation for social movements.[117] My aim is not to use the case study to disprove critics of litigation or offer an unreserved defense of litigation, but rather to describe real-world experiences that add further nuance and detail to the extant scholarship on law and social movements.

A. The Cricket Hollow Zoo

One area of animal exploitation that the animal protection movement has targeted through litigation is the confinement and exhibition of wild animals. Captivity raises significant ethical concerns.[118] Animals suffer physically and psychologically when confined in ways that frustrate their biological needs for space, variety, enrichment, and companionship (or solitude, as is the preference of some species).[119] Captivity also undermines animals' rights by denying them the ability to pursue their own ends, compromising their dignity, and interfering with their ability to thrive.[120] All zoos implicate ethical concerns, and many animal rights activists oppose all captivity on principle.[121] But roadside zoos—unaccredited menageries—are especially concerning because they lack the budget, staff, oversight, and expertise of large professional zoos, and thus tend to cause more animal suffering.[122]

The federal Animal Welfare Act (AWA) requires animal exhibitors to obtain licenses and submit to periodic inspections by the USDA to ensure compliance with welfare regulations promulgated by the Secretary of

116. Lisa L. Miller, *The Use of Case Studies in Law and Social Science Research*, 14 ANN. REV. L. & SOC. SCI. 381, 386 (2018).

117. There are other campaigns and issues within the animal protection movement that would provide fruitful insights about the relationship between law and social change, such as efforts to secure legal rights for animals or litigation to protect farmed animals. Those areas should be subjects of future research, but they are beyond the scope of this Article.

118. *See generally* THE ETHICS OF CAPTIVITY (Lori Gruen ed., 2014).

119. Ron Kagan & Jake Veasey, *Challenges of Zoo Animal Welfare*, *in* WILD MAMMALS IN CAPTIVITY 13–15 (Devra G. Kleiman et al. eds., 2d ed. 2012).

120. LORI GRUEN, ETHICS AND ANIMALS: AN INTRODUCTION 141–55 (2011); *see also* Emma Marris, *Opinion Modern Zoos Are Not Worth the Moral Cost*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2021/06/11/opinion/zoos-animal-cruelty.html.

121. *See* GRUEN, *supra* note 120, at 136–55.

122. *See Roadside Zoos*, ANIMAL LEGAL DEF. FUND, https://aldf.org/issue/roadside-zoos/ (last visited July 27, 2021).

Agriculture.[123] The USDA licenses more than 2,000 such exhibitors under the AWA, the vast majority of which are unaccredited facilities.[124]

One of the thousands of animal exhibitors licensed by the USDA was the Cricket Hollow Zoo, which got its inauspicious start in 1986 when Iowa dairy farmer Pam Sellner bought an "old ugly llama."[125] With her interest in unconventional animals piqued, she and her husband Tom continued to acquire more animals, including a squirrel monkey, a cougar, and a lion cub.[126] In 1992, the Sellners began exhibiting her growing menagerie, taking animals to nursing homes and schools.[127] In 2002, the Sellners began exhibiting animals on their property in Manchester in Delaware County in cages built by Tom, a welder by trade.[128] In 2005, they incorporated the Cricket Hollow Zoo.[129]

Over the ensuing years, the Cricket Hollow Zoo amassed a collection of hundreds of animals, including tigers, lions, hybrid wolves, lemurs, bears, coyotes, foxes, bobcat, baboons, horses, sheep, goats, deer, raccoons, woodchucks, ferrets, guinea pigs, porcupines, armadillos, chinchillas, sloths, coati mundi, capybara, pigs, dogs, a camel, and a skunk, to name just a fraction.[130]

Almost as soon as it opened to the public, the USDA cited the Cricket Hollow Zoo for mistreating animals. During a series of eight inspections over the course of six months from late-2005 to mid-2006, the USDA repeatedly found violations of the AWA regulations, including facilities in disrepair, excessive feces in cages, dirty food and water containers, and inadequate veterinary care.[131] The agency notified the zoo that it had "a chronic management problem."[132] The USDA took the rare step of initiating an

123. 7 U.S.C. § 2134 (requiring licenses for exhibitors); *id*. § 2143 (requiring Secretary to promulgate regulations to protect animal welfare); *id*. § 2146(a) (requiring inspections of exhibitors).

124. The USDA licensed 2,245 exhibitors in December 2019. USDA, OFFICE OF INSPECTOR GENERAL, FOLLOW-UP TO ANIMAL AND PLANT HEALTH INSPECTION SERVICE'S CONTROLS OVER LICENSING OF ANIMAL EXHIBITORS 1 (2021), https://www.usda.gov/sites/default/files/audit-reports/33601-0003-23_final_distribution.pdf. The Association of Zoos and Aquariums (AZA) is the primary private accreditation organization, which accredits zoos based on their compliance with AZA guidelines. Less than 10 percent of USDA exhibitors are accredited by the AZA. *About AZA Accreditation*, ASS'N OF ZOOS & AQUARIUMS, https://www.aza.org/what-is-accreditation (last visited June 23, 2021). For a discussion of accreditation, see Delcianna Winders, *Captive Wildlife at a Crossroads – Sanctuaries, Accreditation, and Humane-Washing*, 6 ANIMAL STUDS. J. 161 (2017).

125. Kuehl v. Sellner, 161 F. Supp. 3d 678, 690 (N.D. Iowa 2016) (hereinafter Kuehl I) (quoting Pam Sellner).

126. Kuehl v. Sellner, No. 01281 EQCV008505, slip op. at 5 (Iowa Dist. Ct. Nov. 24, 2019) (hereinafter Kuehl III).

127. *Id.*

128. *Kuehl I*, 161 F. Supp. 3d at 690.

129. *Id.*

130. *Id.*

131. *Id.* at 695–96.

132. *Id.* (quoting email from Robert M. Gibbens, D.V.M., Director of the Western Region of USDA-APHIS).

enforcement action against the zoo, and in December 2006, the Sellners entered into a settlement agreement with the USDA, paying a penalty of $4,035.[133]

The fine failed to deter the Sellners, who continued to chronically violate the AWA by confining animals in filthy enclosures, failing to provide animals with veterinary care, and causing the deaths of numerous animals through neglect and mismanagement.[134] In May 2011, the USDA issued an official warning to the Sellners for AWA violations related to veterinary care, unsafe facilities, and poor sanitation.[135] Unfortunately, the warning did not seem to make an impression on the Sellners. Just a few months later, a USDA inspector found the following:

> a 3-year-old baboon was not receiving proper care; the goats had excessively long hooves; there was inadequate shelter for sheepdogs; the rabbit boxes were in disrepair with an excessive accumulation of animal waste; there were open boxes of fruit and produce being stored in the reptile house, with "excessive flies and fruit flies hovering over the foodstuffs"; and the monkey enclosure had an excessive build-up of animal waste. There was also an excessive presence of algae in the water provided to the cavy, the capybara, and the bobcat; with an excessive presence of animal waste in the bear, llama, kinkajou, porcupine, and armadillo enclosures . . . [T]he interior enclosure for the ring-tailed lemur did not have adequate lighting and did not "facilitate good husbandry practices nor provide lighting sufficient for Chuki's well-being." [The inspector] also reported "an excessive presence of waste on the perch in the Red Ruffed Lemur's enclosure . . ."[136]

A year later, the problems persisted: In August 2012, the same USDA inspector observed "approximately two weeks of animal waste collected in one spot under the branch in the outdoor run of the ring-tailed lemur enclosure."[137]

In April 2013, the USDA fined the zoo a second time for violating the AWA.[138] Despite the chronic and repeat nature of the violations, the USDA entered into a settlement agreement with the zoo stipulating to a civil penalty of just $6,857.[139] As before, the penalty had little effect on the zoo's animal care programs. An inspection just six weeks after the entry of the settlement "found a capuchin monkey in need of veterinary care; the water receptacle for the dogs contained a build-up of green material; the refrigerator in the reptile house was contaminated with insects; the baboon enclosure was not structurally sound; [and] the sheep and deer enclosure was in disrepair," in addition to other violations.[140]

133. *Id*. at 696.
134. *See id*. at 696, 702–03.
135. Official Warning from USDA to Cricket Hollow Zoo (May 26, 2011) (on file with author).
136. *Kuehl I*, 161 F. Supp. 3d. at 696 (quoting USDA inspection report).
137. *Id*. at 697.
138. Ben Jacobson, *Manchester Zoo Defends Safety Record*, TELEGRAPH HERALD (Oct. 3, 2013), https://www.telegraphherald.com/news/tri-state/article_8fc9b8b5-985e-5cbe-91d4-52f9c6ec5eec.html.
139. *Kuehl I*, 161 F. Supp. 3d at 697–98.
140. *Id*. at 698.

Federal regulatory oversight was patently failing to alleviate the pervasive animal suffering at the zoo.

B. Grassroots Activism

In early 2012, the Cricket Hollow Zoo pinged on the radar of Lisa Kuehl, an Iowa activist concerned about inhumane dog breeders in the state. At the time, Kuehl was reviewing AWA inspection reports on the USDA's website as a volunteer for a small grassroots group called Iowa Friends of Companion Animals, looking for problematic puppy breeders.[141] In her research, Lisa stumbled across an inspection report for the zoo from 2011 and was shocked by what she read. She decided to visit the zoo with her sister Tracey and was horrified by what they experienced: bad smells, small cages strewn with feces, sparse psychological enrichment, stagnant water, and generally poor conditions for the animals.[142]

In July 2012, Tracey and Lisa started a Facebook page called "Cricket Hollow Zoo Concerns" to raise public awareness about the zoo, posting USDA inspection reports and photographs of the dirty conditions at the zoo.[143] They complained to local authorities, including the Iowa Department of Agriculture and Land Stewardship, the state veterinarian, Iowa's Secretary of Agriculture, Delaware County supervisors, the Delaware County sheriff, and the USDA, but received only dismissive responses when they received responses at all.[144] Finally, in 2013, the Kuehls succeeded in convincing a few state legislators to introduce companion bills in the House of Representatives and Senate that would have shut down the zoo by requiring Iowa exhibitors to be accredited zoos, which Cricket Hollow Zoo was not.[145] But the bills were sent to agriculture committees that were categorically hostile to animal protection legislation.[146] Predictably, the bills died without a hearing or a vote.[147]

As Lisa put it: "[W]e did all the things that people tell you you're supposed to do: call the sheriff, call the county attorney, call whoever, you know. And it was like one wall after another. Absolutely nobody—nobody—wanted to talk to us. Nobody wanted to help. Nobody was concerned."[148] The Kuehl sisters were running out of ideas.

141. Interview with Lisa Kuehl (May 3, 2021).
142. *See Kuehl I*, 161 F. Supp. 3d at 693–94.
143. Interview with Tracey Kuehl (May 4, 2021); interview with Lisa Kuehl (May 3, 2021).
144. *See* Complaint ¶ 12, *Kuehl I*, 161 F. Supp. 3d 678.
145. *See* S. File 236, 2013 Leg., Reg. Sess. (Iowa 2013).
146. Interview with Tracey Kuehl (May 4, 2021).
147. *See* S. File 236.
148. Interview with Lisa Kuehl (May 3, 2021).

C. Litigation Against the Zoo

In October 2013, a news story about the Cricket Hollow Zoo's troubles with the USDA brought the facility to ALDF's attention.[149] In ALDF's attorneys' online research into the zoo, they discovered the Cricket Hollow Zoo Concerns Facebook page and reached out to the Kuehl sisters to gather more information about the zoo. Although the Kuehls were initially wary of an out-of-state group and the ordeal of being plaintiffs in litigation, they felt they had exhausted all other avenues of redress. Lisa describes her decision to turn to litigation:

> We were frustrated. By that time, we had invested so much time and energy into dead ends within the state that we thought, "Well, what have we got to lose?" We had done everything we were supposed to do and it resulted in nothing except maybe a little more public awareness. So at that point we decided we're not going to get anywhere by doing the normal stuff. We have to take this to a bigger scale with more muscle than we have here in our state.[150]

Over the next several years, ALDF, representing the Kuehls and as a plaintiff itself, filed six lawsuits concerning the Cricket Hollow Zoo: three lawsuits against the zoo itself, arguing that its inhumane confinement of animals violated the federal Endangered Species Act and the Iowa animal cruelty law, and three lawsuits against the federal and state agencies that allowed the zoo to operate, challenging government underenforcement of animal protection statutes.

I describe those lawsuits and their outcomes next.

1. Kuehl v. Sellner I

In June 2014, ALDF filed the first case of what would turn out to be a years-long litigation campaign. The lawsuit, filed in the United States District Court for the Northern District of Iowa, argued that the zoo's treatment of endangered animals violated the Endangered Species Act (ESA).[151]

Although the ESA is primarily concerned with conserving wildlife in their native habitats, the statute makes no distinction between wild and captive members of endangered species. The ESA prohibits anyone from "taking" an animal listed as endangered by the Fish and Wildlife Service (FWS).[152] The "take" prohibition includes activities that "harass" and "harm" listed species.[153] FWS regulations define the word "harm" in the "take" definition to mean "an act which actually kills or injures wildlife."[154] "Harass" means "an intentional or

149. Interview with Danny Waltz, Staff Att'y, Animal Legal Def. Fund (Apr. 20, 2021) (on file with author).

150. Interview with Lisa Kuehl (May 3, 2021).

151. Complaint ¶ 1, Kuehl I, 161 F. Supp. 3d 678 (N.D. Iowa 2016).

152. 16 U.S.C. § 1538.

153. 16 U.S.C. § 1532(19).

154. 50 C.F.R. § 17.3.

negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[155] These prohibitions on harming and harassing endangered animals implicate inhumane forms of captivity that can kill and injure members of listed species and interfere with species-typical behaviors.[156] The problem, however, was that the federal government had never applied the take prohibition to captive wildlife, focusing instead on threats to endangered animals in the wild.

Animal protection litigators had tried for years to apply the ESA to captive wildlife through the Act's citizen suit provision. In 1993, PETA, represented by animal protection lawyer Katherine Meyer, argued that Las Vegas performer Bobby Berosini violated the ESA's take prohibition by beating captive orangutans to force them to perform.[157] PETA voluntarily dismissed the take claim after the FWS revoked Berosini's captive-bred wildlife permit, effectively giving PETA the relief it sought, but without a court opining on the captive take theory.[158] Several years later, Meyer filed a second captive ESA suit, suing the Ringling Brothers Circus for abusing endangered elephants.[159] The Ringling lawsuit argued that the circus's treatment of endangered Asian elephants—particularly its disciplining of elephants with bullhooks (a rod with a metal hook at the end), its chaining of elephants for long periods of time, and its separation of unweaned baby elephants from their mothers—constituted unlawful takes.[160] The district court dismissed the case on standing grounds, which the D.C. Circuit affirmed, so it failed to establish the sought-after precedent extending the ESA to the inhumane treatment of captive animals.[161]

But seeing enormous potential in Meyer's strategy, ALDF decided to try it again against the Cricket Hollow Zoo. The complaint alleged that the zoo's

155. *Id.*

156. Delcianna J. Winders et al., *Captive Wildlife Under the Endangered Species Act*, *in* ENDANGERED SPECIES ACT 361, 376-381 (Donald C. Baur & Ya-Wei Li eds., 3d ed. 2021).

157. Email from Katherine Meyer, Director, Animal L. & Pol'y Clinic at Harv. L. Sch., to author (July 19, 2021) (on file with author).

158. *Id.*

159. Complaint at 1, Am. Soc'y for Prevention of Cruelty to Animals v. Ringling Bros. et al., 317 F.3d 334 (D.C. Cir. 2003) (No. 1:03CV02006), 2003 WL 24209908, at *1.

160. *Id.*

161. Am. Soc'y for Prevention of Cruelty to Animals v. Feld Ent., Inc., 659 F.3d 13, 17 (D.C. Cir. 2011). Even though the Ringling case failed on standing grounds, it succeeded in generating public controversy about captive elephants. The litigation contributed to a decades-long campaign—comprising litigation, public protest, and local policymaking such as municipal bans on circuses—that ultimately resulted in Ringling closing its tent flaps and ending its elephant performances. Sarah Maslin Nir & Nate Schweber, *After 146 Years, Ringling Brothers Circus Takes Its Final Bow*, N.Y. TIMES (May 21, 2017), https://www.nytimes.com/2017/05/21/nyregion/ringling-brothers-circus-takes-final-bow.html. The Ringling litigation illustrates Doug NeJaime's argument that litigation may succeed in changing public attitudes and catalyzing social change, even when the lawsuit loses in court. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 941 (2011); *see also* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817 (2013); JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2006).

confinement of lemurs, tigers, grey wolves, a serval, and lions constituted an unlawful take because the animals' living conditions harmed and harassed them.[162] Specifically, the complaint alleged that the solitary confinement of lemurs in small, barren cages subjected these social creatures to conditions that interfered with their normal behavioral patterns.[163] The complaint further alleged that the tigers' enclosures—"small cages, each with a packed dirt surface, usually laden with feces but no vegetation"—violated the ESA.[164] The complaint alleged that the wolves, serval, and lions were subjected to similarly deleterious conditions.[165]

In September 2015, the plaintiffs dismissed their claims regarding the lions and the serval because they could not demonstrate that these animals were members of the specific lion and serval subspecies covered by the ESA at the time.[166] The case went to trial for the remaining species—the gray wolves, lemurs, and tigers—in October 2015.[167]

In February 2016, the district court issued its decision.[168] The court held that the gray wolves were not entitled to protection under the ESA because they were wolf-dog hybrids, and therefore, not members of an endangered species.[169] But on the claims related to the lemurs and tigers, the court sided with ALDF and the Kuehls—the first time a court had found that the treatment of captive wild animals violated the ESA.

Regarding the lemurs—Lucy, Chuki, and Zaboo—the court held that their social isolation, the absence of an adequate enrichment program for their psychological well-being, and the unsanitary conditions of their confinement all constituted "harassment" and therefore a "take" under the ESA.[170] The court cited testimony from lemur expert Peter Klopfer that the lemurs were "permanently stressed" and "living miserable lives," including one lemur who was "probably in a near catatonic state."[171] The court noted that five other lemurs—Maddy, Gaz, Tootsie, Cheech, and Kondo—had died at the zoo between 2006 and 2011.[172]

The tigers were also victims of unlawful takes. The court held that the failure to provide adequate veterinary care, which resulted in injury and death, constituted "harm" under the ESA.[173] The court noted that seven tigers—Rajah, Sheba, Sherkhan, Raoul, Casper, Luna, and Miraj—had died at the zoo between

162. Complaint ¶ 2, Kuehl I, 161 F. Supp. 3d 678 (N.D. Iowa 2016).
163. *Id.* ¶¶ 65–78.
164. *Id.* ¶ 83.
165. *Id.* ¶¶ 90–97 (gray wolves), ¶¶ 98–103 (serval), and ¶¶ 104–110 (lions).
166. *See Kuehl I*, 161 F. Supp. 3d at 681 n.1.
167. *Id.* at 680–81.
168. *Id.* at 678.
169. *Id.* at 688–89.
170. *Id.* at 710–11.
171. *Id.* at 702–03.
172. *Id.*
173. *Id.* at 713–16.

2005 and 2015.[174] Casper, Luna, and a lion named Kamarah all died during the single month of November 2014.[175] The zoo's failure to provide the tigers with a sanitary environment also violated the ESA, especially due to the "piles of waste" and "accumulation of feces."[176] The court cited testimony from tiger expert Jennifer Conrad that the tigers were "not being taken care of in the standard that they should be."[177]

The district court ordered the surviving lemurs and tigers removed from the Cricket Hollow Zoo and enjoined the Sellners "from acquiring any additional animals on the endangered species list, without first demonstrating an ability to care for the animals and receiving Court approval."[178] But, over the plaintiffs' objections, the court allowed the Sellners to decide where the lemurs and tigers went.[179] The Sellners sent the lemurs to another roadside zoo, Special Memories Zoo in Wisconsin, and the tigers to the Exotic Feline Rescue Center, neither of which was among the accredited sanctuaries that the plaintiffs had fought for.[180] The court also denied the plaintiffs' request for attorneys' fees.[181]

The defendants appealed to the Eighth Circuit, which, in April 2018, affirmed the district court, firmly establishing the applicability of the ESA's take prohibition to cases of inhumane captivity, especially those involving unsanitary conditions, social isolation, and lack of veterinary care.[182] In addition, the appellate court rejected the defendants' argument that their status as a licensed exhibitor under the AWA gave them blanket immunity from liability under the ESA, making clear that even exhibited animals subject to USDA regulation under the AWA still receive the protections of the ESA.[183] It further held that the district court had not erred, either factually or legally, in its conclusions that the zoo had violated the ESA in its treatment of the tigers and lemurs.[184]

However, the Eighth Circuit did rule against the plaintiffs on two important issues. First, the court affirmed the district court's discretion to allow the defendants to decide where to send the lemurs and tigers.[185] Second, the court

174. *Id*. at 705.

175. *Id*. at 708.

176. *Id*. at 716–17.

177. *Id*. at 704. The court rejected plaintiffs' arguments that the size of the tiger cages, their environmental enrichment, or their nutritional protocols constituted a take under the ESA. *Id*. at 717–18.

178. *Id*. at 719.

179. *Id*.

180. ALDF later sued Special Memories Zoo, which ultimately folded under the pressure of the litigation. Animal Legal Def. Fund v. Special Memories Zoo, No. 20-C-216, 2021 WL 101121 (E.D. Wis. Jan. 12, 2021). The lemurs, however, were not recovered. Interview with Danny Waltz, Senior Staff Att'y, Animal Legal Def. Fund (Apr. 20, 2021).

181. *Kuehl I*, 161 F. Supp. 3d at 719.

182. Kuehl v. Sellner, 887 F.3d 845, 851–54 (8th Cir. 2018).

183. *Id*. at 852.

184. *Id*. at 852–54.

185. *Id.* at 854–55. In a concurrence, Judge Goldberg criticized the district court, noting that "strict adherence by the district court to its own order regarding [placement] may have resulted in the lemurs being relocated to the facility less responsive, on the whole, to their complex social, psychological, and environmental needs." *Id*. at 857 (Goldberg, J., concurring).

upheld the district court's denial of attorneys' fees under the ESA, concluding that "[a]n award of attorney fees here would be inconsistent with the Act's purpose and would unduly expand the scope of litigation under its authority."[186] The court voiced its concern that awarding fees to ALDF and the Kuehls would empower them to "use the Act as a vehicle to close Cricket Hollow" because the heavy costs and fees for the litigation (almost $240,000) would put the Sellners out of business.[187] Such an outcome would, the court feared, "fashion the Act into a weapon to close small, privately owned zoos—a circumstance never discussed during the Act's passage."[188]

Ultimately, although this lawsuit did not close the zoo, it did result in the removal of five endangered animals (three lemurs and two tigers) and established precedent extending the ESA to instances of inhumane captivity, the significance of which is discussed in Part IV.

2. Kuehl v. Sellner II

In January 2016, just a few weeks before the district court ruled in *Kuehl I*, the FWS extended the protections of the ESA to all subspecies of African lions, eliminating the ambiguity that had led ALDF to dismiss its lion claim in the first case.[189] In July 2016, ALDF filed its second ESA lawsuit against the Cricket Hollow Zoo, alleging that the zoo's treatment of two lions, Njjarra and Jonwah, constituted a take.[190]

The lawsuit alleged that the lions "suffer physically and mentally in their cramped and deprived conditions of confinement at the Zoo."[191] The complaint described one "emaciated" lion retching and vomiting with "withdrawn" eyes.[192] The complaint raised concerns about the lions' confinement "in small, barren enclosures" that were "strewn with fly-laden meat and feces."[193] The infestation of flies led the insects to "feast on the ears and noses of the African Lions," resulting in "drops of blood on [their] faces."[194] An investigator hired by ALDF observed Jonwah "shivering, [unable to] stand or walk properly and . . . panting so hard [the investigator] feared she was hyperventilating."[195]

In light of Jonwah's dire condition, the plaintiffs filed a motion for a preliminary injunction, urging the court to order both lions moved to The Wild

186. *Id.* at 855.
187. *Id.* at 856.
188. *Id.*
189. 80 Fed. Reg. 80,043–46 (Dec. 23, 2015).
190. Complaint, Kuehl v. Sellner, No. 16-CV-2078, 2016 WL 9114915 (N.D. Iowa, July 11, 2016) (hereinafter Kuehl II).
191. *Id.* ¶ 2.
192. *Id.* ¶¶ 34, 75.
193. *Id.* ¶ 5.
194. *Id.* ¶ 76.
195. *Id.* ¶ 7.

Animal Sanctuary in Colorado.[196] The court granted a temporary restraining order after finding the plaintiffs were likely to succeed on the merits and expedited the trial.[197] The Sellners, seeing the writing on the wall, agreed to settle the case and released Njjarra and Jonwah to the Wild Animal Sanctuary.[198]

On August 1, 2016, the sanctuary took custody of Njjarra and Jonwah, where Njjarra was nursed back to health in an indoor enclosure before being released into the sanctuary's naturalistic habitat.[199] Upon evaluation at the sanctuary, veterinarians found Jonwah extremely emaciated due to starvation and dehydration.[200] She was humanely euthanized a few months after arriving at the sanctuary.[201] ALDF urged the Delaware County Sheriff's Office and the Delaware County Attorney's Office to prosecute the Sellners for animal cruelty, but, as before, the local authorities took no such action.[202]

3. Kuehl v. Sellner III

The two ESA cases resulted in the removal of three lemurs, two tigers, and two lions from the Cricket Hollow Zoo. Yet hundreds of non-endangered animals continued to languish at the zoo. Because the ESA protects only endangered and threatened species and because the AWA lacks a private right of action or citizen suit provision, ALDF and the Kuehls had no further options for federal lawsuits against the zoo.

But Iowa's anticruelty law also prohibited the Sellners' mistreatment of animals by making it a crime to neglect confined animals and deny them sufficient food and water.[203] The pervasive suffering of animals at the Cricket Hollow Zoo violated these prohibitions. Anticruelty statutes are typically enforced by prosecutors working with police and sheriffs' departments. But the Delaware County Sherriff's Office and the Delaware County Attorney's Office refused to enforce the Iowa animal cruelty law against the zoo and its owners.

The problem of prosecutorial underenforcement of anticruelty laws was not new to ALDF, especially in the context of institutional for-profit abusers like the Cricket Hollow Zoo.[204] As such, ALDF had been trying for years to use civil

196. Motion for and Brief in Support of a Preliminary Injunction at 2, *Kuehl II*, 2016 WL 9114915 (July 11, 2016).

197. Order at 4, *Kuehl II*, 2016 WL 9114915 (July 21, 2016).

198. Press Release, Animal Legal Def. Fund, Lawsuit Results in Two African Lions—Jonwah and Njjarra—Released to Sanctuary from Cricket Hollow Zoo (Aug. 3, 2016), https://aldf.org/article/lawsuit-results-in-two-african-lions-jonwah-and-njjarra-released-to-sanctuary-from-cricket-hollow-zoo/.

199. *Id.*

200. Trish Mehaffey, *Group Charges Lion was Starved at Cricket Hollow Zoo*, WATERLOO-CEDAR FALLS COURIER (Dec. 29, 2016), https://wcfcourier.com/news/local/crime-and-courts/group-charges-lion-was-starved-at-cricket-hollow-zoo/article_814cc885-1707-5221-83ed-b04ce06b2b76.html.

201. Email from Jessica Blome, Attorney, Greenfire L., to author (May 4, 2021) (on file with author).

202. Mehaffey, *supra* note 200.

203. Iowa Code § 717B.3(1).

204. The extent to which the animal protection movement should use the criminal justice system to address animal cruelty is highly contested. Critics like Justin Marceau argue that carceral approaches to cruelty are ineffective, unjust, and counterproductive to animal protection as a liberation movement. *See,*

causes of action to enforce the protections of criminal anticruelty laws. These approaches included the use of consumer protection statutes, taxpayer waste actions, nuisance lawsuits, and private rights of action, all of which may empower civil litigants to enjoin violations of cruelty laws when the criminal justice system fails to act.[205]

Taking a page from that playbook, ALDF decided to pursue a public nuisance action against the Cricket Hollow Zoo. In September 2018, ALDF, representing the Kuehls and two other Iowa residents, sued the zoo in state court, alleging that the zoo's confinement of *all* of the exhibited animals constituted an enjoinable public nuisance because the zoo's treatment of animals was unlawfully cruel.[206] In Iowa, "[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses . . . is a nuisance" which may be enjoined and abated through a civil action.[207] The complaint alleged that the treatment of animals at the zoo "offends the public morals and injures a substantial number of members of the public" by violating Iowa's criminal animal cruelty law.[208] According to the lawsuit, the zoo "publicly, repeatedly, continuously, persistently, and intentionally cause[d] animal suffering by neglecting animals" and "fail[ed] to provide humane and safe conditions for the animals through their failure to clean feces in each animal's cage, drain pools of standing water, provide clean water for animals to drink, or provide adequate food for animals to eat."[209]

Although ALDF had secured settlements in a few prior cases using the legal theory that animal cruelty constituted an enjoinable nuisance, such a claim had never been litigated to a decision on the merits.[210] Given the claim's novelty, the jurisdiction's political conservativeness, and the drastic nature of the requested

e.g., JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT 117, 128 (2019). I am sympathetic to this critique. My discussion of the lack of enforcement here has less to do with wanting a punitive or carceral response to the Sellners' animal cruelty and more to do with highlighting the apathy of local officials and the potentially productive consequences of putting civil enforcement power in the hands of movements. As the nuisance case demonstrates, allowing someone other than the state to intervene to stop animal cruelty can accomplish the ameliorative goals of the movement while avoiding the potential injustices of incarceration and other collateral consequences of the criminal justice system.

205. *See, e.g.*, Echgelmeier v. Placeta Ranch, No. 18-CA-003523 (Fla. Cir. Ct. Aug. 28, 2019) (allowing ALDF's nuisance claim to enforce animal cruelty law); Animal Legal Def. Fund v. Cal. Exposition & State Fairs, 192 Cal. Rptr. 3d 89, 90 (2015) (rejecting ALDF's use of taxpayer waste statute to enforce animal cruelty law); Animal Legal Def. Fund v. LT Napa Partners, 184 Cal. Rptr. 3d 759, 762 (2015) (allowing ALDF's use of unfair competition law to enforce foie gras ban); Animal Legal Def. Fund v. Mendes, 72 Cal. Rptr. 3d 553, 554 (2008) (rejecting ALDF's effort to privately enforce animal cruelty law).

206. Petition in Equity for Declaratory Judgement and Injunction ¶ 1, Kuehl III, No. 01281 EQCV008505 (Iowa Dist. Ct. Sept. 27, 2018).

207. Iowa Code § 657.1.

208. Petition ¶ 1, *Kuehl III*, No. 01281 (Iowa Dist. Ct. Sept. 27, 2018).

209. *Id.* ¶ ¶ 28–29.

210. *See, e.g.*, Prizniak v. Animaland Zoological Park, No. 1:2016cv00420 (M.D. Pa. Mar. 9, 2016); *Animaland Zoological Park*, ALDF, https://aldf.org/case/animaland-zoological-park/ (last visited June 22, 2022).

relief, the nuisance suit represented a Hail Mary effort to rescue the remaining animals and permanently shutter the zoo.

Shortly before trial in October 2019, the lawyers for ALDF made a precarious gamble: they petitioned the judge to conduct a judicial site visit.[211] The motion was risky because the visit shifted the terrain of the dispute from the controlled sterility of the courtroom—where testimony can be predictably elicited from expert witnesses and documents—to the more unpredictable and emotive realm of the zoo itself. If the Sellners cleaned up the zoo in advance, a site visit ran the risk of undercutting ALDF's documentary and testimonial evidence of animal cruelty. Would a site visit be more likely to horrify the judge or mollify her?

On the first day of trial, Judge Monica Wittig granted the site visit request and went straight to the zoo. Back in court later that day, Judge Wittig described her visit:

> I didn't see healthy and happy animals today. I saw a bear that looked like it [*sic*] was drugged. It had fluids seeping out if its mouth and nostrils. I saw a dog that looked like it was rabid. None of the animals were in any type of clean environment . . . I saw a great deal of unsanitary, horrible, rusted containments for animals that need to roam. I saw pacing. I saw banging up against chain link fences . . . The smell was horrific . . . [W]hat I saw today paints a picture a thousand words can't describe.
>
> . . .
>
> I walked in the front door, and I gagged. I gagged. The reptile room is not a reptile room. It looks like an outhouse. And smells exactly like one. Those reptiles have no room to move. There are no branches for them to do what they naturally do in their habitats.
>
> . . .
>
> I walked out, and the first thing I thought to myself was, I need to take at least two showers to feel comfortable. And it's making me shake right now. It's terrible. And it just disheartens me that nothing has been done after this fine lady [Tracey Kuehl] has tried to get something accomplished, and our government is just sitting on its laurels and doing nothing.[212]

The lawyers' gamble had paid off. Turning the zoo itself into a site of adjudication by bringing the judge face-to-face with suffering elicited an emotive and affective response that mere testimony could not.

In November 2019, the court issued its decision, holding that the Cricket Hollow Zoo was "a public nuisance as defined in the Iowa Code and pursuant to common law in that it is injurious to the health of the animals and potentially to the invitees due to the poor care and living conditions of the animals. Furthermore, the zoo is unreasonably offensive to the senses in the inhumane manner of living of the animals."[213] The court ordered the nuisance abated, enjoining the Sellners

211. Plaintiffs' Motion for Site Visit by the Court of Cricket Hollow Animal Park, *Kuehl III*, No. 01281.

212. Transcript at 86–89, *Kuehl III*, No. 01281 (Iowa Dist. Ct. Oct. 16, 2019).

213. *Kuehl III*, slip op. at 16 (Iowa Dist. Ct. Nov. 24, 2019).

from owning wildlife and divesting them of ownership of the animals at the zoo, effectively shutting down the Cricket Hollow Zoo permanently.[214] Unlike the court in *Kuehl I*, the court gave the plaintiffs the power to decide where to rehome the animals.[215]

In December 2019, when ALDF, along with the Animal Rescue League of Iowa and other partners, arrived at the zoo to execute the judgment and rescue the animals, they were dismayed to find many of them missing. In the two weeks between the decision and the rescue, the Sellners had removed more than one hundred animals, including mountain lions, grizzly bears, macaws, and kinkajous (an act for which the district court later held the Sellners in contempt of court).[216] Nevertheless, the rescuers removed more than four hundred animals from the Cricket Hollow Zoo and transferred many of them to sanctuaries and rescue organizations.[217] In August 2021, the Iowa Court of Appeals affirmed the district court decision.[218] The nuisance litigation thus accomplished a significant movement goal: the rescue of hundreds of animals and the permanent closure of a roadside zoo that had abused animals for years.

D. Litigation Against the Government

The Sellners were directly culpable for the pervasive animal suffering at the zoo, but they were assisted by the complacency of the local, state, and federal officials charged with regulating them. The county sheriff's office, local council members, state agriculture department, and USDA routinely ignored Tracey and Lisa Kuehl's repeated entreaties to protect the animals at the zoo. The litigation campaign therefore targeted not only the Sellners and the zoo, but also the government agencies that ignored and facilitated the animal suffering at the Cricket Hollow Zoo.[219]

214. *Id*. at 17 (the court's decision applied to "the animals that are deemed exotic . . . and other wild life." As such, the Sellners were allowed to keep the cows from their dairy operation and a few exhibited animals who were characterized as "livestock.").

215. *Id*.

216. Philip Joens, *Mountain Lions, Grizzly Bears Among 110 Animals Missing from Iowa Roadside Zoo, Group Says*, DES MOINES REG. (Jan. 9, 2020), https://www.desmoinesregister.com/story/news/2020/01/09/cricket-hollow-animal-park-animals-missing-iowa-roadside-zoo-animal-legal-defense-fund-claims/4420426002/. The district court found that "[t]he deception that was used to hide the animals was deliberate and . . . [the Sellners] enlisted others in the attempts to thwart the judicial process." Order Re Application for Rule to Show Cause at 11, *Kuehl III*, No. 01281 (Iowa Dist. Ct. Sept. 28, 2021). Judge Wittig fined the Sellners $500 for each animal who was missing, totaling $70,000, or, in the alternative, sentenced them to 140 days in jail. *Id*.

217. Philip Joens, *More than 400 Animals Now Rescued from Troubled Eastern Iowa Zoo*, DES MOINES REG. (Dec. 12, 2019), https://www.desmoinesregister.com/story/news/crime-and-courts/2019/12/12/more-animals-rescued-cricket-hollow-zoo-manchester-iowa/4414229002/.

218. Kuehl v. Sellner, No. 19-1980, 2021 WL 3392813, at *6–7 (Iowa Ct. App. Aug. 4, 2021).

219. I omit discussion of ALDF's administrative petition and subsequent lawsuit against the Iowa Department of Agriculture and Land Stewardship because the legal theories were unremarkable, and the outcome was insignificant. *See* Born Free USA v. Iowa Dep't of Agric. & Land Stewardship, 895 N.W.2d 923 (Iowa Ct. App. 2017). The lawsuit unsuccessfully sought to increase the regulatory fees for roadside

1. ALDF v. Vilsack I

To the chagrin of ALDF and the Kuehls, the USDA repeatedly took two seemingly inconsistent actions: it identified chronic, significant violations of the AWA, yet it also continually renewed the license that allowed the Sellners to exhibit animals under the Act. The USDA did take meager enforcement actions against the zoo, assessing civil penalties against the Sellners in 2006 and 2013 and issuing an official warning in 2011, but the agency repeatedly renewed the license that allowed the Sellners to exhibit animals, despite the agency's own conclusion that "there [was] a chronic management problem at the facility, and, for whatever reason, the Sellners either do not understand the regulations, are not willing to comply, or are not able to comply."[220]

In April 2014, Tracey Kuehl sent a letter to the USDA requesting that it not renew the zoo's exhibitor license in light of the repeated violations of the AWA documented by the agency's inspectors.[221] The USDA responded that it had recently opened an investigation into the zoo, but it would nevertheless grant the Sellners' license renewal, which it did in May 2014 and again in May 2015.[222] On the *very same day* that the USDA renewed the Sellners' exhibitor license in 2015, its on-the-ground inspectors found eleven violations of the AWA.

Section 2133 of the AWA states, "no . . . license shall be issued until the . . . exhibitor shall have demonstrated that his facilities comply with the [welfare] standards" of the Act.[223] Renewing chronic AWA violators' exhibitor licenses would seem to violate this provision. Nevertheless, while the USDA conducted compliance inspections before issuing licenses to *new* exhibitors, the agency did not ensure that facilities *renewing* their exhibitor licenses complied with AWA regulations. Instead, the USDA automatically renewed exhibitor licenses whenever the applicant self-certified their compliance "by signing the application form that to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards."[224] The USDA took such certifications at face value, issuing renewal licenses as a matter of course.

For years, animal protection attorneys had been frustrated by the USDA's practice of renewing licenses for chronic violators of the AWA, notwithstanding section 2133, referring to the practice as "rubberstamping."[225] ALDF and PETA

zoos, including the Cricket Hollow Zoo, in hopes that such fees would be prohibitively expensive for the Sellners.

220. Kuehl I, 161 F. Supp. 3d 678, 695–96 (N.D. Iowa 2016) (quoting email from Robert M. Gibbens, D.V.M., Director of the Western Region of USDA, Animal and Plant Health Inspection Service (USDA-APHIS) (Nov. 8, 2006)).

221. Complaint ¶ 19, Animal Legal Def. Fund v. Perdue, 872 F.3d 602 (D.C. Cir. 2017); *Perdue*, 872 F.3d at 609.

222. *Perdue*, 872 F.3d at 609.

223. 7 U.S.C. § 2133.

224. *Perdue*, 872 F.3d at 608 (describing former 9 C.F.R. §§ 2.1, 2.2, and 2.7).

225. *See, e.g.*, Press Release, PETA, PETA Statement re Court Decision in 'Rubber-Stamping' Case (June 28, 2017), https://www.peta.org/media/news-releases/peta-statement-re-court-decision-rubber-stamping-case/.

had challenged this practice in several prior cases, arguing that the USDA's policy of rubberstamping renewal license applications from chronic AWA violators violated the statute. But the Fourth Circuit in *PETA v. USDA* and the Eleventh Circuit in *ALDF v. USDA* each rejected the argument, holding that the agency's policy of automatically granting administrative license *renewals* while subjecting *initial* license applications to inspections to confirm actual compliance was entitled to *Chevron* deference.[226] Because the AWA itself is silent about the process for renewing exhibitor licenses, the courts deferred to the USDA's interpretation of the statute and found its renewal policy to be reasonable.[227]

In August 2014, just a few months after filing the first ESA case, ALDF and the Kuehls sued the USDA in the United States District Court for the District of Columbia, arguing that the USDA's rubberstamp renewal of the Cricket Hollow Zoo's license violated section 2133's requirement that applicants "demonstrate" compliance with the regulations, and was arbitrary and capricious in violation of the Administrative Procedure Act (APA).[228] In March 2016, the district court granted the government's motion to dismiss the case, persuaded by the Eleventh Circuit's reasoning that the USDA's rubberstamping policy passed muster under the *Chevron* doctrine.[229]

On appeal, the D.C. Circuit agreed with the Fourth Circuit, Eleventh Circuit, and the district court that the USDA's policy on license renewals was not "'manifestly contrary to the statute'" and was entitled to deference.[230] But, significantly, ALDF prevailed on its other claim—not that the rubberstamping policy violated the AWA on its face, but that in this *particular* case, the USDA's reliance on the zoo's self-certification of compliance may have been arbitrary and capricious in light of the strong evidence of noncompliance that the agency itself had gathered.[231] The USDA had documented seventy-seven violations of the AWA at the Cricket Hollow Zoo during the license renewal periods at issue in the case, including eleven violations on the day that the USDA accepted the zoo's avowal that it was complying with the Act.[232] As such, as ALDF argued, the court "face[d] a 'smoking gun' case in which the agency actually knows with certainty that the exhibitor's self-certification that it is in compliance with all

226. People for the Ethical Treatment of Animals v. United States Dep't of Agric., 861 F.3d 502, 510 (4th Cir. 2017); Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1224 (11th Cir. 2015). PETA and ALDF's first effort to challenge the USDA's policy on renewal licenses was *Ray v. Vilsack*, No. 5:12-CV-212-BO, 2014 WL 3721357 (E.D.N.C. July 24, 2014), which did not succeed and was not appealed. For a broader discussion of the issue, see Delcianna J. Winders, Administrative License Renewal and Due Process – A Case Study, 45 FLA. ST. U. L. REV. 439 (2019).

227. *People for the Ethical Treatment of Animals*, 861 F.3d at 510; *Animal Legal Def. Fund v. U.S. Dep't of Agric*., 789 F.3d at 1224.

228. *See Perdue*, 872 F.3d at 609.

229. Animal Legal Def. Fund v. Vilsack, 169 F. Supp. 3d 6, 14–15 (D.D.C. 2016).

230. *Perdue*, 872 F.3d at 610, 617–18 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).

231. *Id*. at 620.

232. *Id*. at 618.

regulations and standards . . . is false."[233] Although the D.C. Circuit did not hold definitively that such reliance was arbitrary and capricious, it did remand to the agency to explain why it had *not* acted arbitrarily and capriciously when it relied on a certification it knew was false.[234] The animal protection movement had finally succeeded in challenging the USDA's rubberstamping policy, at least in "smoking gun" cases of noncompliance.

On remand, the matter was stayed, because on July 30, 2015, the USDA—at long last—initiated an administrative enforcement proceeding against the Cricket Hollow Zoo for violating the AWA.[235] In April 2020, the USDA and the Sellners entered into a consent order permanently revoking their exhibitor license.[236] Consequently, ALDF and the USDA stipulated to a dismissal of the rubberstamping case.[237] Despite the ultimate dismissal, ALDF had succeeded in convincing the D.C. Circuit to set the important precedent that the USDA could no longer ignore rampant violations of the AWA when renewing exhibitor licenses. As discussed below, this precedent pushed the USDA to promulgate new regulations that eliminated the practice of rubberstamping renewals altogether.[238]

2. ALDF v. Vilsack II

When the USDA initiated its enforcement action against the Cricket Hollow Zoo in 2015, ALDF was relieved to see the agency finally take more aggressive action, but it remained wary. In light of the agency's past leniency towards the zoo and its overall tendency to seek conciliatory outcomes with the AWA-regulated community,[239] ALDF was concerned that the case would not be vigorously prosecuted and that the zoo would be allowed to continue operating.[240] Behind the scenes, ALDF sought to share with the USDA attorneys the information and documents it had obtained on the Cricket Hollow Zoo in its prior litigation, but the USDA declined the legal assistance.[241] In response, and in pursuit of a longstanding organizational objective of inserting itself into agency enforcement actions, ALDF filed a motion in October 2015 to formally intervene

233. *Id.* at 619.

234. *Id.* at 620.

235. *In re* Cricket Hollow Zoo, Nos. 15-0152, 15-0153, 15-0154, 15-0155 (Dep't of Agric. July 30, 2015) (Complaint) (on file with author).

236. *In re* Cricket Hollow Zoo, Nos. 15-0152, 15-0153, 15-0154, 15-0155 (Dep't of Agric. Apr. 20, 2020) (Consent Decision) (on file with author).

237. Stipulation of Settlement and Dismissal, ALDF v. Perdue, No. 14-1462-CKK (July 9, 2020) (on file with author).

238. *See infra* Part IV.A.3.

239. *See generally* Delcianna J. Winders, Administrative Law Enforcement, Warnings, and Transparency, 79 OHIO ST. L.J. 451 (2018).

240. Motion for Leave to Intervene by the Animal Legal Defense Fund at 2–3, Cricket Hollow Zoo, Nos. 15-0152, 15-0153, 15-0154, 15-0155 (Dep't of Agric. Oct. 28, 2015) (on file with author).

241. Animal Legal Defense Fund's [Requested] Reply to Complainant's Response to Motion to Intervene, Cricket Hollow Zoo, Nos. 15-0152, 15-0153, 15-0154, 15-0155 (Dep't of Agric. Dec. 4, 2015) (on file with author).

in the administrative adjudication.[242] ALDF argued that its interest in the outcome of the administrative proceeding made it an "interested person" entitled to intervene under the APA.[243] The USDA opposed the intervention, arguing that ALDF's "interests in protecting the animals at the Zoo" were "beyond the scope of the AWA [and] . . . irrelevant to [the] proceeding."[244] The Administrative Law Judge sided with the USDA, holding that "the viewpoints and positions of a non-party are not relevant" to determining whether the zoo violated the AWA and, if so, what the penalties should be.[245] After the USDA Judicial Officer upheld the ALJ's decision, ALDF appealed the denial of intervention to the federal district court in Washington, D.C.[246]

The district court reversed, holding "that ALDF's demonstrated interest in the welfare of the zoo's animals falls squarely within the scope of the USDA enforcement proceeding."[247] ALDF's general interest in animal welfare and particular interest in the animals at the Cricket Hollow Zoo would "be impaired if [the USDA] failed to prove the alleged violations or negotiated a settlement that did not provide for the adequate care of the zoo's animals, or if the ALJ imposed a penalty that did not sufficiently sanction the zoo's conduct."[248] As such, ALDF qualified as an "interested person" under the APA, who should be allowed to intervene "[s]o far as the orderly conduct of public business permits."[249] The court, noting that ALDF's participation could be either "beneficial" or "duplicative," remanded to the agency to consider whether ALDF's intervention would burden the proceedings.[250] On remand, the agency, predictably, concluded that ALDF's participation would interfere with the orderly conduct of the proceeding and denied ALDF intervenor status, a decision upheld by the district court.[251]

Although ALDF was ultimately denied the right to participate in this particular proceeding, the intervention case nonetheless opened the door to the participation of animal protection organizations in future AWA enforcement actions. It is too soon to know whether that possibility will materialize. Still, the intervention case is an important development with potential to give animal

242. *Id.*

243. *See* 5 U.S.C. § 555(b).

244. Complainant's Response to Motion to Intervene at 4, Cricket Hollow Zoo, Nos. 15-0152, 15-0153, 15-0154, 15-0155 (Dep't of Agric. Nov. 23, 2015) (on file with author).

245. Order Denying Motion to Intervene at 2, Cricket Hollow Zoo, Nos. 15-0152, 15-0153, 15-0154, 15-0155 (Dep't of Agric. Dec. 30, 2015) (on file with author).

246. ALDF v. Vilsack, 237 F. Supp. 3d 15, 18 (D.D.C. 2017).

247. *Id.* at 18–19.

248. *Id.* at 23.

249. *Id.* at 21–22 (quoting 5 U.S.C. § 555(b)).

250. *Id.* at 23–24.

251. Animal Legal Def. Fund, Inc. v. Perdue, 346 F. Supp. 3d 153, 161 (D.D.C. 2018), *vacated in part, appeal dismissed in part sub nom. Animal Legal Def. Fund, Inc. v. United States Dep't of Agric. & Sonny Perdue*, No. 18-5359, 2020 WL 4873759 (D.C. Cir. June 11, 2020).

advocates a voice in administrative enforcement actions in order to hold the USDA accountable for its enforcement responsibilities.[252]

All told, the lawsuits that make up the Cricket Hollow Zoo litigation campaign were largely successful on their merits. The first ESA case ended in a judgment after trial in favor of the plaintiffs. It was later affirmed on appeal, resulting in five animals leaving the zoo. The second ESA case settled, resulting in two more animals leaving the zoo. The nuisance case ended in a judgment after trial in favor of the plaintiffs, resulting in more than four hundred animals leaving the zoo, despite efforts by the Sellners to circumvent the judgment. The federal rubberstamping case forced the USDA to reconsider granting the Cricket Hollow Zoo's exhibitor license. The AWA intervention case forced the USDA to consider allowing nonprofits to participate in license revocation hearings, although ALDF was denied the opportunity to do so in the Cricket Hollow Zoo proceeding.

But was the litigation campaign "effective" in a truly meaningful sense? The following Part evaluates this question in conversation with the literature on law and social movements.

III. EVALUATING THE CRICKET HOLLOW ZOO CAMPAIGN AND ITS IMPLICATIONS FOR SOCIAL MOVEMENT LAWYERING

Having outlined the animal protection movement's use of litigation generally in Part I, the critiques of social movement litigation in Part II, and the case study of the Cricket Hollow Zoo litigation campaign in Part III, this Part evaluates the efficacy of the litigation campaign and its lessons for social movement litigation more generally.

The question of litigation's efficacy for social movements largely depends on how one conceives success. Scholars have evaluated this question by examining both the direct effects of litigation, which flow from its juridical consequences, and the indirect effects of litigation, which flow from its extra-juridical consequences as a political and sociocultural event.[253] In terms of direct effects, litigation can succeed by winning a case that changes or establishes the legal rights and duties of the parties, setting precedent that benefits the movement in future cases, or pressuring governmental actors or other defendants to change policies and practices.[254] Extra-juridical effects include raising public consciousness about an unseen problem, mobilizing public opinion against injustice, and galvanizing social movements.[255]

In the animal protection context, litigation may directly and concretely benefit animals through judicial decisions or settlements that transform their

252. Press Release, Animal Legal Def. Fund, Federal Court Clears Path for Citizen Intervention in Animal Welfare Act Proceedings (Feb. 16, 2017), https://aldf.org/article/federal-court-clears-path-for-citizen-intervention-in-animal-welfare-act-proceedings/.

253. *See* Cummings, *supra* note 57, at 1707.

254. *Id.*

255. *Id.* at 1714–15. *See generally* MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

material conditions.[256] Litigation may also work indirectly, with animal lawyers using litigation as an adjunct to social movement activism or an opportunity to change public consciousness on animal issues.[257] The Cricket Hollow Zoo campaign accomplished both types of benefits. As such, the campaign provides a unique lens through which to evaluate the effectiveness of litigation as a social movement strategy. In what follows, I evaluate the outcomes of the Cricket Hollow Zoo cases to see what can be learned about the efficacy of litigation for social movements.

A. Direct, Juridical Benefits

The most conventional way that law contributes to social change is through the adjudication of discrete legal disputes, which creates new legal entitlements and obligations. By establishing legal relationships between parties in specific disputes, litigation can alter conditions in ways that advance the agenda of a social movement. The Cricket Hollow Zoo litigation worked in this way. The campaign directly benefitted animals in at least three ways: by liberating hundreds of animals from suffering, by setting precedent that has been used in other cases to rescue other animals, and by forcing changes in the federal government's regulatory policies concerning captive wild animals.

1. Liberating Exploited Individuals

The Cricket Hollow Zoo campaign illustrates the potential importance of litigation's direct and material effects, which some scholars have deemphasized in the wake of cynicism about the ability of litigation to produce significant social reform and a consequent reorientation towards the indirect, constitutive, and mobilization effects of litigation.[258] As Scott Cummings observes, the critical analysis of litigation has "channeled law and society scholarship . . . away from a focus on impact litigation and its direct effects on state power and social behavior, toward the idea of *legal mobilization*."[259] Although the capacity of litigation to produce positive indirect effects for social movements is unquestionably a crucial element in evaluating litigation's efficacy—indeed, I discuss it below—investigation of these mobilization effects should not obscure litigation's direct benefits for social movements. It is not just the *performance* of litigation, but the *entry of judgments* that can transform material conditions in important and liberatory ways.

If, as Robert Cover famously put it, "[l]egal interpretation takes place in a field of pain and death," then certain interpretations inflict less pain and death than others.[260] Social movements fighting for a just world can use litigation to

256. SILVERSTEIN, *supra* note 57, at 196.
257. *Id.* at 197.
258. Cummings, *supra* note 111, at 371.
259. *Id.* at 375.
260. Robert M. Cover, *Violence and the Word*, 95 YALE L. J. 1601, 1601 (1986).

proffer interpretive readings of law that occasion their constituents' release from violence, abuse, and captivity.[261] How these traditional legal outcomes—judgments, injunctions, declarations, orders, and precedents—may be the mechanism by which an individual gains such release must continue to be part of the analysis of litigation's efficacy.

The Cricket Hollow Zoo cases illustrate the power of litigation to directly benefit animals and transform their lives in material ways.[262] As a project of individual liberation, the campaign was wildly successful. More than four hundred animals had their lives fundamentally transformed, moving from conditions of utter deprivation to new homes at sanctuaries and rescue organizations. Among the hundreds of animals rescued were two lions, thirteen llamas, ten parakeets, eight sugar gliders, three cockatiels, two military macaws, two opossums, one crested gecko, one coatimundi, two black bears, three cavies, four skunks, three coyotes, a wallaby, three baboons, three cats, thirty-three rats, twenty-seven mice, eleven raccoons, five miniature horses, and three donkeys, to name a fraction.[263] Adoptable animals, such as cats, rabbits, and hamsters, found new homes with private individuals. The wild animals, such as the bears, coyotes, and baboons, found new homes at sanctuaries, where they received care for their physical and psychological needs.[264] Animals whose entire lives consisted of frustrated instincts, loneliness, and inescapable exposure to filthy conditions are now exploring naturalistic enclosures, bonding with other members of their species, and receiving respect for their dignity, all of which they were denied at the Cricket Hollow Zoo.[265]

This outcome—reducing suffering and respecting the ability of individual animals to flourish—is at the heart of the movement for animal rights and

261. *See, e.g.*, Lani Guinier & Gerald Torres, *Changing the Wind Notes Toward A Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2755 (2014) ("[Social movements] succeed when they (1) shift the rules that govern social institutions, (2) transform the culture that controls the meaning of legal changes, and (3) affect the interpretation of those legal changes by providing the foundation for naturalizing those changes into the doctrinal structure of law and legal analysis."). Guinier and Torres criticize top-down litigation strategies for their demobilizing effects but acknowledge litigation as an "essential" tactical approach to proffering new, movement-led interpretations of law. *Id.* at 2756 n.49.

262. Of course, not all animal protection litigation results in animals being rescued, so this benefit is not an unequivocal endorsement of litigation as a tactic in all cases.

263. *Roadside Zoo ARL Assists in Rescue & Removal of Hundreds of Animals in Eastern Iowa*, ANIMAL RESCUE LEAGUE OF IOWA (Dec. 9, 2019), https://www.arl-iowa.org/news/news/roadside-zoo-arl-assists-in-rescue—removal-of-hundreds-of-animals-in-eastern-iowa/; Press Release, Animal Legal Def. Fund, Lawsuit Results in Two African Lions—Jonwah and Njjarra—Released to Sanctuary from Cricket Hollow Zoo, *supra* note 198.

264. A full accounting of the material outcomes for individual animals must acknowledge that many animals were not liberated. For the lemurs and tigers in the first ESA case, the hundred animals who vanished before the nuisance judgement could be enforced, and the animals that the court did not characterize as wildlife, litigation was not a pathway to liberation. The extent to which this fact undercuts litigation's efficacy is discussed *infra* Part IV.C.1. (Implementation Gaps).

265. *Five New Lives Roadside Zoo Monkey Rescue*, BORN FREE USA, https://www.bornfreeusa.org/primate-sanctuary/fivenewlives/ (last visited July 10, 2021); Ruthanne Johnson, *Rescuing Animals, Helping Them Thrive at Wild Animal Sanctuary*, BOULDER MAG. (Winter / Spring 2016 – 17), https://getboulder.com/rescuing-animals-helping-thrive-wild-animal-sanctuary/.

liberation.[266] The animal protection movement calls on us to recognize animals as sentient beings with rich emotional lives, complex social connections, and diverse interests who are individually and collectively entitled to justice and respect.[267] Evaluating litigation's efficacy by considering the material and experiential outcomes for individuals is important in movements where the moral significance of the individual is a crucial tenet of the movement itself. It is even more critical when the constituency's fundamental capacities for rich experience and meaningful existence are socially and legally contested. The prevailing ideology of our anthropocentric culture denies individual animals' moral value, making legal campaigns of individual liberation an ethical imperative and an important opportunity to reframe questions of justice.

This reorientation towards the experience of individuals is an important supplement to other analyses of the efficacy of litigation, which have framed the question of litigation's efficacy at the macro level. Rosenberg's analysis, for example, defines "significant social reform" as "policy change with nationwide impact," admitting that "[t]his definition of significant social reform does not take much note of the role of the courts in individual cases."[268] But, as liberation movements contend, the lived experiences of oppressed individuals are ethically salient—their joy and suffering must be part of how we think about success.[269] While nationwide policy reform and movement-wide constitutive effects are significant considerations, they are only part of the picture. By redirecting attention to material outcomes and direct effects in individual cases, we gain insights into how litigation may be transformative.

In this way, animal protection litigators in the trenches of cases like those against the Cricket Hollow Zoo are in some ways analogous to other public interest attorneys whose work is valuable and liberatory because it saves lives, reduces suffering, and respects the dignity of marginalized communities and individuals, not merely because of its contribution to significant social reform in the grand sense. Austin Sarat, for example, describes the work of anti-death penalty lawyers as "a kind of hand-to-hand combat against the bureaucracy of law's violence, in which the good lawyer tries to save one life at a time."[270] Likewise, direct legal service providers, who participate in discrete disputes to protect vulnerable people's homes, jobs, and livelihoods, can empower clients

266. *See* Martha C. Nussbaum, *Beyond "Compassion and Humanity" Justice for Nonhuman Animals*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 299–300 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

267. *Id.*

268. ROSENBERG, *supra* note 64, at 4–5.

269. *See, e.g.*, *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about ("By combating and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy, we are winning immediate improvements in our lives."); *see also* Angela P. Harris, *Foreword The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 781–82 (1994) ("The search for empowerment thus draws not only on the capacity for reason, but also on the capacity for joy.").

270. Austin Sarat, *Between (the Presence of) Violence and (the Possibility of) Justice Lawyering Against Capital Punishment*, *in* CAUSE LAWYERING, *supra* note 16, at 332.

and reduce human suffering, even without broader campaigning or precedent.[271] Recognizing the utility of this kind of legal advocacy is a necessary corrective to the traditional analysis of public interest lawyering that has centered impact litigation and broad-scale social change while often ignoring the role of direct legal services.[272]

Looking at litigation's potential benefits for oppressed individuals alongside its system-wide effects also closely mirrors the decision-making process of many cause lawyers, who are not so naïve to think that litigation alone is likely to transform society fundamentally.[273] From the perspective of social movement actors, including litigators, the relevant question is not simply whether a given lawsuit will accomplish the movement's ends at the national level. The question, rather, is whether a case is worth doing and whether it will significantly and materially improve the lives of members of the constituent community.[274]

Danny Waltz, one of the attorneys on the Cricket Hollow Zoo campaign, described rescuing individual animals as the most significant outcome of his work:

> One thing that I love about litigating is that through a crystallized case, you can have outcomes for the individuals on the ground . . . I think the more that I do this work—animal litigation work—the more it really matters to me to get an outcome for individual animals . . . The most meaningful cases now to me are not necessarily the ones that took the most briefing, with the most creative idea, that led to a little bit of an advancement of precedent, but instead where I was able to use my lawyering to move some individuals to sanctuary. That's what gives me happiness when I think back on it.[275]

The potential efficacy of litigation becomes clear from the perspective of individual animals. Consider Mrs. Wilkin, the macaque monkey confined in terrible conditions at the Cricket Hollow Zoo who, after the nuisance suit, lived the remainder of her life at the Born Free sanctuary. As one of Mrs. Wilkin's caretakers put it, "even though she had suffered for so many years, she embraced

271. *See, e.g.*, Rebecca Sharpless, *More Than One Lane Wide Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 348 (2012).

272. ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 211 (2013).

273. *See* McCann & Silverstein, *supra* note 16, at 287. Ann Southworth's research has found that civil rights and poverty lawyers adopt a critical and nuanced approach in their practices. *See* Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 509–11 (1999); *see also* Alan K. Chen, *Rights Lawyer Essentialism and the Next Generation of Rights Critics*, 111 MICH. L. REV. 903, 924 (2013) (reviewing RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY (2011).).

274. Dunbar-gronke, *supra* note 12, at 16–17 (proposing a rubric to "clearly identify *the material benefits* that the law can exact for Black liberation organizing," which includes the tangible outcomes for individuals) (emphasis added).

275. Interview with Danny Waltz, *supra* note 149. *See also* Interview with Amanda Howell, Senior Staff Att'y, Animal Legal Def. Fund (Apr. 28, 2021) ("These individual animals that I met and looked in the eye as they were suffering in this terrible place—they now have really nice lives. Like, *yeah, that worked*.").

her new life so completely, living each day to the fullest."[276] For her and the other four hundred animals rescued from the Cricket Hollow Zoo, litigation unquestionably transformed their lives in ways that would not have been possible otherwise.

Animals at sanctuaries continue to bear the marks of their exploitation, suffering from physical and psychological conditions that may last a lifetime. In light of these ongoing injuries and the fact that sanctuaries are still a form of confinement, we should be wary of equating sanctuary placement with full liberation.[277] Nevertheless, as Elan Abrell argues, sanctuaries "can be understood as a praxis of empathic engagement,"[278] an effort to meet animals on their own terms within the limits and possibilities of a space built for care and rehabilitation. Sanctuaries may also serve as sites for contesting animals' current legal status and re-envisioning animals' subjectivity outside of the property framework. At sanctuaries, "animals can gain social and political lives as participants in inter-species communities formed around the unmaking of property-based human-animal relations."[279] In this way, the animals rescued from the Cricket Hollow Zoo now living in sanctuaries are not only passive objects of social movement lawyering, but subjects of multi-species political and legal theory in action—participants in prefigurative efforts to rethink how humans and nonhumans coexist.

2. Setting Precedent

Social movement lawyers use litigation not only to achieve positive outcomes in specific disputes, but also to set precedent that will more broadly reconfigure legal relationships in future cases. Such precedent can benefit the animal protection movement by limiting the rights of animal users to exploit animals, increasing movement access to courts, and expanding substantive legal protections for animals through statutory interpretation.

Admittedly, putting one's confidence in precedent-setting impact litigation contains an element of the legal liberalism scholars have persuasively critiqued. The legal liberal ideal of precedent radically reconfiguring social relationships has rightly been questioned and undermined by a more realistic assessment of the complications arising from the indeterminacy of legal texts and their inability to predetermine the outcomes in subsequent cases, as well as judicial failures in

276. Tyson, *supra* note 8.

277. Elan Abrell, *Interrogating Captive Freedom The Possibilities and Limits of Animal Sanctuaries*, 6 ANIMAL STUD. J., no. 2, 2017, at 3. *See also* ELAN ABRELL, SAVING ANIMALS: MULTISPECIES ECOLOGIES OF RESCUE AND CARE 177 (2021) ("[W]hile they may hope for a world in which animals are liberated from human control, sanctuary caregivers are currently committed to a course of action in which complete liberation is impossible as long as animals can only be rescued and cared for in captivity.").

278. Abrell, *Interrogating Captive Freedom*, *supra* note 277, at 4.

279. ABRELL, SAVING ANIMALS, *supra* note 277, at 175.

implementing decisions.[280] But that critical analysis should not obscure the fact that precedent can nevertheless influence judicial decision-making in future cases and guide the choices made by judges, agencies, and others about how to behave.[281] Although judges inclined to distinguish precedential cases may find bases for doing so, new precedential decisions may also create the scaffolding upon which judges can render progressive decisions. These processes, though indeterminate, have material consequences for movement constituencies. Where precedent can lay the groundwork for future litigation victories or deter harm to a movement's constituencies, impact litigation remains a valuable contribution to progressive social change.[282]

The Cricket Hollow Zoo campaign demonstrates how well-planned and well-executed litigation strategies can be transformative not only for the individuals involved in the case, but also for others similarly situated in later cases. In the Cricket Hollow Zoo campaign, ALDF secured precedent-setting appellate opinions from the Eighth Circuit in the first ESA case and from the D.C. Circuit in the rubberstamping lawsuit. It also obtained favorable decisions at the trial court level in novel cases of first impression in the nuisance case and in the intervention case. Although not technically binding precedent, the trial court decisions affirming the movement's ability to use nuisance actions to enjoin cruelty and intervene in administrative enforcement proceedings could be persuasive in future cases where animals are abused and exploited.

The *Kuehl* ESA precedent has been particularly valuable for the animal protection movement. As discussed, animal protection lawyers have urged an expansive reading of the ESA to extend it beyond a conception of animals as conservable "resources" and towards a conception of animals as sentient beings with legal entitlements. As Danny Waltz argues, "the Act provides rights and welfare protections for individual members of endangered species at the experience level of the individual animal."[283] Before *Kuehl*, the contours of such protection were unclear, untested, and unenforced. The Eighth Circuit decision in *Kuehl* began to finally give shape to the scope of these protections for captive animals. The *Kuehl* litigation established, as a matter of law, that isolation of social species, poor sanitation, lack of veterinary care, and

280. *See* Mark V. Tushnet, *Following the Rules Laid Down A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793, 802 (1983); *see also* Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339, 340 (1996). On implementation gaps, see ROSENBERG, *supra* note 64, at 420.

281. *See generally* Madeline Fleisher, *Judicial Decision Making Under the Microscope Moving Beyond Politics Versus Precedent*, 60 RUTGERS L. REV. 919 (2008). *See also* Richard M. Re, *Precedent As Permission*, 99 TEX. L. REV. 907, 907 (2021) (describing precedent as a "shortcut" or "shield" that grants judges permission to follow a prior decision).

282. Cummings, *supra* note 57, at 1713 ("Movement lawyers can play crucial roles in . . . normative exchanges [that frame issues of justice] by . . . gradually building precedent that helps influence public opinion and validate[s] new legal principles over time.").

283. Danny Waltz, *The "Embarrassing" Endangered Species Act Beyond Collective Rights for Species*, 45 COLUM. J. ENV'T L. 1, 2 (2020); *see also* Winders et al., *supra* note 156, at 366-67.

inadequate enrichment for captive members of listed species could constitute a take.[284]

The benefit of precedent for social movements is its portability to other cases and the rippling benefits it can have for a cause. For example, using the ESA to protect captive wild animals has become central to the animal protection movement's legal efforts to rescue endangered animals from roadside zoos. Around the same time ALDF was pursuing the Cricket Hollow Zoo case, PETA was also invoking the ESA in its roadside zoo litigation.[285] Litigators from ALDF and PETA have repeatedly used the ESA in numerous cases: arguing that the ESA prohibits the inhumane captivity of an elephant in Texas,[286] a chimpanzee in Louisiana,[287] an orca in Florida,[288] lions and tigers in Indiana,[289] a lemur and a scarlet macaw in Pennsylvania,[290] wolves in Minnesota,[291] and chimpanzees in Missouri,[292] to name a few. Many of these cases have invoked the *Kuehl* precedent, amplifying the case's value beyond its direct role in saving five tigers and lemurs from the Cricket Hollow Zoo.[293] These cases have resulted in the rescue of dozens of animals and given them new lives in sanctuaries, magnifying the direct-impact benefits discussed in the previous subpart.[294]

284. Kuehl I, 161 F.Supp. 3d 678, 718 (N.D. Iowa 2016).

285. *See, e.g.*, People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, 843 F. App'x 493 (4th Cir. 2021); People for the Ethical Treatment of Animals, Inc. v. Dade City's Wild Things, No. 8:16-CV-2899-T-36AAS, 2020 WL 897988 (M.D. Fla. Feb. 25, 2020).

286. Graham v. San Antonio Zoological Soc'y, 261 F. Supp. 3d 711 (W.D. Tex. 2017).

287. Breaux v. Haynes, No. CV 15-769-JJB-RLB, 2017 WL 5158699 (M.D. La. Aug. 3, 2017), *report and recommendation adopted*, No. CV 15-769-JJB-RLB, 2017 WL 5202873 (M.D. La. Aug. 21, 2017).

288. People for the Ethical Treatment of Animals, Inc., v. Miami Seaquarium, 189 F. Supp. 3d 1327, 1355 (S.D. Fla. 2016), aff'd, 879 F.3d 1142 (11th Cir. 2018), adhered to on denial of reh'g, 905 F.3d 1307 (11th Cir. 2018).

289. People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc., 476 F. Supp. 3d 765, 769 (S.D. Ind. 2020).

290. Animal Legal Def. Fund v. Lucas, No. CV 19-40, 2021 WL 298442, at *4 (W.D. Pa. Jan. 5, 2021); Press Release, Animal Legal Def. Fund, Farmers Inn Roadside Zoo Sued for Mistreatment of Animals (Jan. 15, 2019), https://aldf.org/article/farmers-inn-roadside-zoo-sued-for-mistreatment-of-animals/.

291. Animal Legal Def. Fund v. Fur-Ever Wild, No. 17-CV-4496 (JNE/HB), 2018 WL 5840046 (D. Minn. Nov. 8, 2018).

292. Missouri Primate Found. v. People for the Ethical Treatment of Animals, Inc., No. 4:16 CV 2163 CDP, 2020 WL 1139026 (E.D. Mo. Mar. 9, 2020), *order clarified*, No. 4:16 CV 2163 CDP, 2020 WL 12834579 (E.D. Mo. Aug. 24, 2020).

293. *See, e.g.*, *Missouri Primate Found*., *order clarified*, 2020 WL 12834579, at *3 ("Among other things, PETA alleges Casey is directly and indirectly responsible for keeping primates in social isolation, failing to provide adequate veterinary care, and failing to maintain sanitary or suitably enriched conditions, all of which have been held to constitute 'harm' or 'harassment' under the ESA. *See* Kuehl v. Sellner, 887 F.3d 845, 853 (8th Cir. 2018).").

294. *See, e.g.*, PETA, *PETA Rescues 22 Animals from Roadside Zoo Wildlife in Need,'* https://www.peta.org/about-peta/victories/peta-rescues-22-animals/ (last visited June 22, 2022); PETA, *Rescued! Big Cats, Lemurs, and Others Move to Sanctuary from Local Roadside Zoo* (Feb. 1, 2022), https://www.peta.org/media/news-releases/rescued-big-cats-lemurs-and-others-move-to-sanctuary-from-local-roadside-zoo/.

Subsequent litigation by PETA has further expanded the scope of protections for captive wildlife under the ESA beyond those established in *Kuehl*. In *PETA v. Wildlife in Need*, an Indiana district court held that a roadside zoo's painful practice of declawing big cats, which consists of amputating a cat's last knuckle, violated the ESA because it subjected the animals to pain and stress.[295] The roadside zoo's owner, Tim Stark, admitted to declawing out of convenience to make the cats easier to handle.[296] The court also held that prematurely separating tiger cubs from their mothers, which Stark had done to at least 35 tiger cubs, some as young as one day old, violated the ESA.[297] Similarly, Stark's hosting of "tiger baby playtime" events, in which the public was allowed to handle tiger cubs, constituted a take by interfering with their natural instincts and subjecting them to "extreme stress."[298]

The government itself has now used the precedents established by PETA and ALDF against high-profile animal abusers, including those at the center of the popular Netflix docuseries *Tiger King*, which profiled the captive tiger industry.[299] In November 2020, the Department of Justice (DOJ) filed a civil action in the Eastern District of Oklahoma against Jeffrey and Lauren Lowe, the Tiger King Zoo, and the Greater Wynnewood Exotic Animal Park, alleging violations of the ESA and the AWA against as many as two hundred animals, including big cats and lemurs.[300] Using the same theory as *PETA v. Wildlife in Need*, the complaint alleged that the defendants violated the ESA by "routinely separat[ing] their Big Cat cubs and ring-tailed lemur pups from their mothers at too early an age . . . , resulting in physical and psychological harm" and "routinely forc[ing] [them] to have direct contact with members of the public."[301] And using the same theory as *Kuehl*, the DOJ alleged that the unsanitary conditions, unwholesome diets, inadequate enclosures, and lack of veterinary care also violated the ESA's take prohibition.[302]

In January 2021, the district court granted the DOJ's request for a preliminary injunction, citing *Kuehl* and *Wildlife in Need*.[303] The preliminary injunction ordered the defendants to cease exhibiting animals, retain a veterinarian, relinquish all big cat cubs and their mothers, and refrain from

295. People for the Ethical Treatment of Animals, Inc. v. Wildlife in Need & Wildlife in Deed, Inc., 476 F. Supp. 3d 765, 776 (S.D. Ind. 2020).

296. *Id*. at 777.

297. *Id*. at 768, 782.

298. *Id*. at 783–85.

299. The Animal Law Podcast, *The Case of the Tiger King's Tigers*, OUR HEN HOUSE (Jan. 27, 2021), https://www.ourhenhouse.org/2021/01/alp68/ (conducting an interview with Brittany Peet, Deputy General Counsel for Captive Animal Law Enforcement, PETA Foundation).

300. *See* Complaint for Declaratory and Injunctive Relief ¶¶ 8, 18, 19, 22–24, United States v. Lowe, No. 20-CV-0423-JFH, 2020 WL 6814295 (E.D. Okla. Nov. 19, 2020).

301. *Id*. ¶¶ 18–19, 132–58, 197–212.

302. *Id*. ¶¶ 13–22, 95–131, 159–69, 189–96, 213–20.

303. Opinion and Order, United States v. Lowe, No. 20-CV-0423-JFH, 2021 WL 149838, at *5, *11 (E.D. Okla. Jan. 15, 2021).

obtaining and disposing of any animal covered by the AWA or ESA.[304] In May 2021, the government executed a search-and-seizure warrant and seized from the Lowes sixty-eight big cats, all of whom were sent to reputable sanctuaries.[305] A news release announcing the action quoted a DOJ attorney as saying, "[t]his seizure should send a clear message that the Justice Department takes alleged harm to captive-bred animals protected under the Endangered Species Act very seriously," a position the DOJ had not taken publicly before.[306] The Lowes subsequently entered into a consent decree, surrendering their interests in the animals and agreeing to permanently cease exhibiting animals.[307]

The Cricket Hollow Zoo campaign and the cases that followed it illustrate how precedent-setting impact litigation can significantly affect social movements. Movement litigators often push for creative and untested interpretations of statutes.[308] When their interpretations take hold and courts solidify them as precedent, a movement's legal theory transforms from a novel interpretive hypothesis to a battle-tested doctrine, at which time other institutional actors are more likely to use it, thereby magnifying its effect.[309] In this case, a movement legal theory several decades in the making—that the ESA's take prohibition prohibits inhumane captivity—has been used in numerous cases, with life-changing outcomes for scores of animals.

3. Changing Policy

Social movements should be wary of placing excessive faith in significant progressive reform through the administrative state. Regulatory agencies are often captured by the powerful interests they are supposed to regulate.[310] And even when agencies make decisions in the public interest, conservative courts often strike them down to protect corporate interests.[311] Nevertheless, as William Eskridge notes, "[i]n the modern regulatory state, we are saturated with law,"

304. *Id*. at *16–17.

305. Tori B. Powell, *Big Cats Seized from Tiger King Park Taken in by Sanctuaries*, CBS NEWS (May 26, 2021), https://www.cbsnews.com/news/tiger-king-park-big-cats-seizure-sanctuaries/.

306. Press Release, U.S. Dep't of Justice, U.S. Government Seizes 68 Protected Big Cats and a Jaguar from Jeffrey and Lauren Lowe (May 20, 2021), https://www.justice.gov/opa/pr/us-government-seizes-68-protected-big-cats-and-jaguar-jeffrey-and-lauren-lowe.

307. Press Release, U.S. Dep't of Justice, Justice Department Ensures Jeffrey and Lauren Lowe Are Permanently Prohibited from Exhibiting Animals and Terminates Their Interests in Seized Animals (Jan. 3, 2022), https://www.justice.gov/opa/pr/justice-department-ensures-jeffrey-and-lauren-lowe-are-permanently-prohibited-exhibiting.

308. *See* Cummings, *supra* note 57, at 1712.

309. *See, e.g.*, *id.* at 1712–13.

310. *See, e.g.*, George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."). For a case study concluding that "at least some publicly important rules that emerge from the regulatory state may be influenced heavily by regulated parties, with little to no counterpressure from the public interest," see Wendy Wagner et al., *Rulemaking in the Shade An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 151 (2011).

311. *See, e.g.*, West Virginia v. EPA, 597 U.S. ___ (2022) (substantially limiting EPA's power to regulate pollutants that contribute to the climate crisis under the Clean Air Act).

making attention to the complexity of administrative law important for social movements.[312] Given the pervasiveness of regulatory law, administrative litigation can be a way of challenging agency decision-making that affects movements and the communities they serve. It can also be a tool for pressuring agencies to promulgate rules to address regulatory failings that leave oppressed individuals and communities vulnerable.

The Cricket Hollow Zoo litigation, particularly the rubberstamping suit, served these purposes by pressuring the USDA to promulgate a new rule that overhauled the way it treats exhibitor licenses under the AWA.[313] The new rule, finalized in May 2020, eliminated the rubberstamping policy at issue in *ALDF v. Perdue*, in which the agency automatically renewed licenses annually as long as the exhibitor self-certified compliance with the AWA.[314] Under the new rule, the USDA may now grant a three-year exhibitor license, then must conduct a compliance inspection before issuing a new license.[315] Thus, the USDA needs to confirm compliance through its own inspections rather than taking the exhibitor at their word. The new rule also requires the USDA to deny licenses to any exhibitor who has violated federal, state, or local laws "pertaining to animal cruelty" within three years of the application or longer if such violations "render the applicant unfit to be licensed."[316]

Admittedly, these changes are modest in the grand scheme of animal exploitation and not the sort of drastic social change that animal protection activists demand. Nevertheless, these incremental changes could help prevent future situations like that involving the Cricket Hollow Zoo, in which a facility that chronically abuses animals retains its exhibitor license in perpetuity. The USDA is now legally obligated under section 2133 of the AWA to deny license applications to repeat violators. If the USDA continues to grant licenses to chronic violators of the AWA, organizations will have the opportunity to challenge such licenses under the APA, potentially forcing the revocation of licenses and the closing of more roadside zoos. Jessica Blome, one of the lead attorneys on the Cricket Hollow Zoo cases, concluded that although "there is still much work to be done," the rule change "move[s] incrementally closer to the AWA providing meaningful protections for animals."[317]

312. William N. Eskridge, Jr., *Channeling Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 420 (2001).

313. Amendments to Licensing Provisions and to Requirements for Dogs, 85 Fed. Reg. 28,772, 28,772 (May 13, 2020).

314. *See, e.g.*, *id*. at 28,784.

315. *Id*. at 28,779.

316. 9 C.F.R. § 2.11(a)(5).

317. Jessica Blome, *USDA License Renewal Rule is Small Step for Animal Welfare*, LAW360 (Aug. 19, 2020), https://www.law360.com/articles/1302036/usda-license-renewal-rule-is-small-step-for-animal-welfare.

B. Indirect, Extra-Juridical Benefits

Much of the recent scholarship on law and social movements has focused on litigation's indirect, constitutive, and extra-juridical effects. As Doug NeJaime notes, this "legal mobilization perspective recognizes the constraints of court-centered tactics, [but] views the role of law expansively and sees litigation as a potentially powerful resource available to social movement actors."[318] This approach is central to the animal protection movement's valuing of litigation, with "[l]awyer and nonlawyer activists alike not[ing] the significant contribution litigation made to political education and publicity, and, in turn, to movement building."[319]

The Cricket Hollow Zoo campaign illustrates these benefits. The campaign not only had significant direct benefits in rescuing animals, setting precedent, and changing policy, but it also had important benefits for the animal protection movement beyond the decisions themselves. The campaign raised public consciousness about animal suffering at roadside zoos and the complicity of government regulators in that suffering. It also empowered local activists to deepen their commitment to the movement, while creating procedural opportunities for animal protection advocates to make their voices heard in AWA proceedings, a forum from which they had previously been excluded.

1. Raising Consciousness

The primary extra-juridical use of litigation in the animal protection movement is to generate publicity to raise public consciousness about animal exploitation. This exploitation is often hidden from view or filtered through anthropocentric narratives that obscure the reality of animal suffering, such as when factory farms wrap their products in "humane" labels or when roadside zoos portray themselves as educational.[320] By highlighting the plight of animals in realms that are otherwise concealed, the animal protection movement seeks to build public consensus against animal exploitation and rally social support for individual, political, and structural change.[321] As Helena Silverstein notes, "[t]he

318. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 667 (2012).

319. McCann & Silverstein, *supra* note 16, at 269; *see also* SILVERSTEIN, *supra* note 16, at 167.

320. On the politics of visibility and concealment in the meat industry, see generally TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT (2011). On the misleading labeling of animal products, see generally LaTravia Smith, *The "Fowl" Practice of Humane Labeling Proposed Amendments to Federal Standards Governing Chicken Welfare and Poultry Labeling Practices*, 18 SUSTAINABLE DEV. L. & POL'Y 17 (2017). For an example of obfuscation in the roadside zoo industry, see Pamela Sellner, *Cricket Hollow Zoo Unfairly Targeted*, DYERSVILLE COM. (Aug. 12, 2015), https://www.dyersvillecommercial.com/opinion/cricket-hollow-zoo-unfairly-targeted/article_9dce1e3e-4079-11e5-a179-ef918128daf7.html (describing Cricket Hollow Zoo as a "non-profit educational corporation").

321. *See* Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1466 (2015) ("Following the path of muckrakers, investigative journalists, law enforcement officials, and civil rights testers, animal rights activists, scholars, and journalists in recent

publicity promoted through lawsuits assists in this education process and can mobilize other movement activities."[322]

The Cricket Hollow Zoo litigation campaign significantly altered public discourse about the specific zoo and contributed to conversations about captivity generally. Before the campaign began in 2014, press coverage of the zoo was sparse but generally favorable and uncritical. In February 2004, the Telegraph Herald in Dubuque, Iowa, ran a puff piece on the Sellner's mobile operation.[323] The story describes Pam Sellner taking Natasha, a tiger cub, to elementary schools, where Natasha "seem[ed] to enjoy the attention" and "greet[ed] her visitors with a gentle purr-like sound" and a wave.[324] In reality, cub petting is extremely stressful for baby tigers and contributes to cycles of captivity and inhumane breeding of adult tigers, facts the article failed to mention.[325] The article described the Sellner's expansive menagerie as "cuddly" and "fascinating" and quoted Pam: "'It's a hobby gone bad,' she said, with a sheepish smile."[326]

The zoo received a flurry of press in July and August 2011 after a tiger named Kahn mauled Tom Sellner, but the coverage remained largely uncritical. The Des Moines Register, the most circulated newspaper in Iowa, published an article about the zoo shortly after the tiger attack that described the zoo as a "storybook scene" where "[t]he Sellners coexist[ed] peacefully with all manner of creatures."[327] The Cricket Hollow Zoo, the story claimed, was "like some kind of experiment in global diversity."[328] The article appeared in August 2011, the same month that the USDA cited Cricket Hollow Zoo for filthy cages and animal neglect.[329]

But once the ESA lawsuit was underway, the Register's coverage of the zoo took a much more critical tone, asking questions like "Should this zoo be shut down?" [330] and "Why is this zoo still in business?"[331] The Cricket Hollow Zoo case received extensive local and state coverage. Many of these articles centered the suffering of individual animals, as when the Register amplified the allegation

years have been conducting their own undercover investigations of the agricultural industry to expose unlawful and unethical mistreatment of animals.").

322. SILVERSTEIN, *supra* note 16, at 167; *see also* David L. Trowbridge, *Engaging Hearts and Minds How and Why Legal Organizations Use Public Education*, 44 LAW & SOC. INQUIRY 1196 (2019).

323. John Everly, *Wild Kingdom Dairy Farm Home to a Menagerie of Exotic Pets*, TELEGRAPH HERALD, Feb. 1, 2004.

324. *Id*.

325. *Cub Petting*, WILDCAT SANCTUARY (Apr. 24, 2017), https://www.wildcatsanctuary.org/cub-petting-reasons-avoid/.

326. Everly, *supra* note 323.

327. Mike Kilen, *Rural Zoo Where Tiger Attacked Keeper is Like Storybook Scene*, DES MOINES REG., Aug. 5, 2011.

328. *Id*.

329. Kuehl I, 161 F. Supp. 3d. 678, 696 (N.D. Iowa 2016) (quoting USDA inspection report).

330. Grant Rodgers, *Should This Zoo Be Shut Down?*, DES MOINES REG. (Nov. 4, 2015), https://www.desmoinesregister.com/story/news/crime-and-courts/2015/11/04/troubled-zoos-owner-do-pretty-decent-job/74755202/.

331. *Editorial Why Is This Zoo Still in Business?*, DES MOINES REG., Sept. 2, 2015, at A12.

that animals were confined in "barren, dimly lit and deteriorating cages" or when the Associated Press covered the plaintiffs' expert testimony that the lemurs were "living miserable lives" in "small and dirty cages."[332]

ALDF's public messaging on the case framed the Cricket Hollow Zoo as not just an aberrant case of animal cruelty, but as representative of a broader problem with roadside zoos.[333] Press coverage reflected this framing, situating the Cricket Hollow Zoo litigation within the larger context of animal exhibition and recognizing that the Cricket Hollow Zoo was not an anomalous facility. As one article put it, the ESA case "thrust the tiny Iowa zoo into a larger battle of ideologies over exotic animal ownership."[334] An article from the Associated Press described the suffering of animals in detail and paraphrased the animal protection movement's insistence that "people should stop visiting roadside zoos."[335]

The media coverage not only raised the public profile of inhumane roadside zoos, but it also highlighted the failure of state and federal regulators to stop animal suffering. The Register published an editorial excoriating the USDA for rubberstamping renewal applications—noting that the agency had renewed the Cricket Hollow Zoo's license despite more than one hundred AWA violations over the prior three years.[336] The Register was even more damning of the Iowa Department of Agriculture and Land Stewardship. The Register's editorial called out one state inspector's complicity, quoting him referring to animal advocates as "the complaint crowd," who, despite Pam Sellner's "conscious efforts to make her facility completely ready for their visits . . . will complain anyway."[337] Pulling no punches, the Register's editorial board concluded that "Iowa's state inspectors . . . need to pull their heads out of the sand and recognize that when animals are neglected on their watch, 'the complaint crowd' is well within its rights to raise hell."[338]

Press coverage and movement communications about the litigation have not only told the stories of animals' suffering but also described their rescue. An article about The Wild Animal Sanctuary described the rescue of the lions from the Cricket Hollow Zoo, including pictures of Njjarra and Jonwah in their new

332. Lee Hermiston, *Animals Suffering at Zoo in Manchester, Suit Says*, DES MOINES REG., June 13, 2014, at A11; *Researcher Lemurs Living Miserable Lives at Iowa Zoo*, ASSOCIATED PRESS STATE & LOCAL (Oct. 7, 2015), https://www.telegraphherald.com/news/tri-state/article_f1539d64-6d05-11e5-adca-abc957b3f458.html; *see also* Grant Rogers, *Iowa Zoo's Lemurs Miserable,' Researcher Testifies*, DES MOINES REG. (Oct. 6, 2015), https://www.desmoinesregister.com/story/news/crime-and-courts/2015/10/06/iowa-zoos-lemurs-miserable-researcher-testifies/73456140/.

333. *See, e.g.*, *Roadside Zoos*, ANIMAL LEGAL DEF. FUND, https://aldf.org/issue/roadside-zoos (last visited July 10, 2021).

334. Rodgers, *supra* note 332.

335. Barbara Rodriguez, *Lawsuit in Iowa Challenges So-Called Roadside Zoos,'* ASSOCIATED PRESS (Oct. 8, 2015), https://apnews.com/article/e160b6274e5142038976e67a0c23984c.

336. *Why is this Zoo Still in Business?*, *supra* note 331.

337. *Id.* (quoting inspector Doug Anderson).

338. *Id.*

habitats.[339] Born Free USA, the sanctuary that rescued five monkeys, told the story of the rescue, described the monkeys' new environs, and included photos and videos of their new lives on its website.[340] Articles and public communications like these help to foster movement optimism that activism can work while also constructing a fuller vision of animal liberation beyond victimhood and suffering. As Lauren Corman argues, when we focus on animals' capacity for curiosity, joy, and companionship, "[n]onhuman animals move from being seen as passive victims, to emotional, and often social and cultural subjects whose lives have inherent worth."[341] Where lawsuits result in liberation—or at least significant changes in material circumstances—litigation can raise consciousness about the movement's grievances and its positive vision of a just society for the community it seeks to defend.

The present case study offers anecdotal evidence that animal protection litigation can instigate positive media coverage of the movement and help shift narratives about animal suffering.[342] In the Cricket Hollow Zoo campaign, litigation opened opportunities for press coverage and public education about animals—both their capacity to suffer and to enjoy a life well lived. This kind of public education is important for a number of the animal protection movement's objectives, including shifting cultural understandings of who animals are, changing public opinion about what kind of treatment is socially acceptable, and galvanizing support for political, systemic, and individual change.[343] These findings counsel in favor of social movements continuing to use litigation as a tool for generating press coverage and public attention.

Finally, the Cricket Hollow Zoo case illuminates how litigation provides a forum for publicizing the affective and emotive elements of social movements' grievances. Scholars have explored these elements in the context of social movements' claims and campaigns,[344] but the role of affect in social movement litigation remains largely unexplored. The Cricket Hollow Zoo campaign demonstrates how social movements can emphasize injustice and suffering in ways that draw out emotive and affective responses from their audiences—both the public and legal actors. Emphasizing in affective terms what the animals endured at the zoo made the press coverage more sympathetic, but it also made the litigation more successful. As the judge in the nuisance action put it, coming face-to-face with suffering animals "paint[ed] a picture [that] a thousand words

339. Johnson, *supra* note 265.

340. *Five New Lives Roadside Zoo Monkey Rescue*, *supra* note 265.

341. Lauren Corman, *Ideological Monkey Wrenching Nonhuman Animal Politics Beyond Suffering*, in ANIMAL OPPRESSION AND CAPITALISM 266 (David Nibert ed., 2017).

342. Such findings fill a gap identified by Steven Tauber, whose research concluded that "there is no evidence that litigation generates positive coverage of the [animal rights] movement and its goals." TAUBER, *supra* note 16, at 190.

343. *See* Cherry, *supra* note 39, at 451; Munro, *supra* note 39.

344. James M. Jasper, *The Emotions of Protest Affective and Reactive Emotions in and Around Social Movements*, 13 SOCIO. F. 397, 420–21 (1998).

can't describe."[345] Highlighting the emotional and affective elements of the litigation then fed back into the press coverage, as when the Associated Press ran a story headlined "Judge Overseeing Zoo Trial Says She Gagged on the Stench There."[346] Bringing affective bodily responses into the narrative of litigation can be an especially powerful way of drawing out indignation towards injustice among the public and judges.[347]

2. Empowering Activists

The relationship between lawyers and activists is a fraught one.[348] Litigation has the capacity to promote movement goals, as discussed above, but at the same time, it may take power out of the hands of activists, tame their normative demands, and coopt their agendas in compromising ways.[349] These outcomes can hamper the efficacy of social movements externally by undermining their effectiveness. They can also have negative internal effects within the movement itself by undermining activists' self-efficacy and marginalizing non-lawyers from the task of social change.[350] Litigation may empower or disempower social movement activists, and it may either mitigate or exacerbate the trauma they already experience in contesting exploitation.[351] Where litigation substitutes the judgment of legal professionals for the engaged knowledge of social movement activists, it risks disempowering activists and magnifying their trauma.[352] But where movement lawyers act in solidarity with activists and use litigation to address their grievances and validate their framing of social problems, litigation can be empowering and a means of acknowledging trauma in productive ways.[353]

Client empowerment is important in the animal law context, given the traumatic backdrop that animal rights activism shares with other social movements. As Taimie Bryant observes, animal protection activists "often require themselves to stare violence fully in the face, since those directly victimized

345. Transcript at 86–89, Kuehl III, No. 01281 EQCV008505 (Iowa Dist. Ct. Oct. 16, 2019).

346. *Judge Overseeing Zoo Trial Says She Gagged on the Stench There*, ASSOCIATED PRESS (Oct. 17, 2019), https://apnews.com/article/ce00c71c2b34460084474aa614e88f49.

347. *Cf.* Kamari Maxine Clarke, *Affective Justice The Racialized Imaginaries of International Justice*, 42 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 244, 261 (2019) ("In legal studies, interrogating affects can be a generative way to make sense of what the inner body, combined with biopolitical and social regimes can tell us about the impact of various legal rituals (e.g. trials, testimonies, and political settlements) along with the affective biopolitics that shape them. In the context of violence and its remedies, studying the deployment of affects can help policymakers, lawmakers, and scholars understand which emotions are likely to mobilize support; which discursive strategies and imaginaries are visualized; and why and to what effects (consciously intended and unintended).").

348. Brown-Nagin, *supra* note 85, at 1511.

349. *See* Albiston, *supra* note 87, at 74.

350. *See generally* GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 24 (1992); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 458 (2001).

351. Cummings & Eagly, *supra* note 350, at 459–60.

352. *Id.*

353. *See* McCann & Silverstein, *supra* note 16, at 275; Luke W. Cole, *Empowerment As the Key to Environmental Protection The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 661 (1992).

cannot escape, as can we, by closing their eyes."[354] This obligation to bear witness to animal suffering is a hallmark of contemporary animal activism.[355] But such exposure to animals' suffering brings with it a cost.[356] Exposure to violence against animals is itself traumatizing, and that trauma is compounded by the social trivialization of those who care about animals' suffering and the normalization of animal exploitation.[357] This trauma can significantly impede effective advocacy by draining activists' emotional reserves and inhibiting their resilience.[358] Given this pervasive trauma, it is imperative to find ways to address trauma and support activists by promoting a sense of efficacy, solidarity, and community. Bryant urges advocates who engage in legal advocacy to contest the roots of this trauma by validating activists' concerns and clearing space for them to voice grievances on animals' behalf.[359]

The Cricket Hollow Zoo campaign empowered activists within the movement in two important ways: its impacts on the individual plaintiffs and the avenues it opened for future advocacy.

First, both Lisa and Tracey Kuehl described their involvement in the litigation as an empowering and validating experience. Lisa said the litigation campaign, far from being disempowering and deradicalizing, has made her a better activist and advocate.[360] Asked whether she felt empowered or disempowered by the litigation, Lisa responded:

> I was excited that somebody else wanted to do some of the work, because we were so burned out by that point. So I didn't feel like I was giving up anything in any way. In fact, I kind of thought things were just finally starting to happen, so it was the best thing that could have happened . . . Sometimes [local activism works], sometimes it doesn't, and I think you need to know when it's time to shift gears. And thankfully, the gear dropped right in our lap [when ALDF contacted us about litigating].[361]

Tracey Kuehl described her own transformation as an activist from participating in the litigation campaign: "I can tell you that in the process, I became a stronger advocate, and I am not as fearful an advocate now . . . I became more confident."[362] Tracey also said she "never felt that the attorneys [were] taking anything away from [her]" but were rather "bringing the technical expertise to [her] story" by translating her grievances into a framework that was

354. Taimie Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 98 (2006).

355. *See, e.g.*, Ian Purdy & Anita Krajnc, *Face Us and Bear Witness! "Come Closer, as Close as You Can . . . and Try to Help!" Tolstoy, Bearing Witness, and the Save Movement*, *in* CRITICAL ANIMAL STUDIES: TOWARDS TRANS-SPECIES SOCIAL JUSTICE 45 (Atsuko Marsuoka & John Sorenson eds., 2018).

356. *See generally* PATTRICE JONES, AFTERSHOCK: CONFRONTING TRAUMA IN A VIOLENT WORLD (2007).

357. Bryant, *supra* note 354, at 115.

358. *Id.* at 98.

359. *Id.* at 117–18.

360. Interview with Lisa Kuehl (May 3, 2021).

361. *Id.*

362. Interview with Tracey Kuehl (May 4, 2021).

legally cognizable.[363] As Herbert Eastman notes, this process of translation can be disempowering when dry, detached legal writing "lose[s] the fullness of the harm done . . . [and] the significance of it all."[364] Nevertheless, as Eastman notes, mindful social movement lawyers can overcome this trap by refusing to efface the lived experiences of their clients and the movement's constituents, by "writ[ing] the pleading[s] as a story, the story as an argument for change."[365] This is what happened in the Cricket Hollow Zoo litigation.

Litigation may be empowering to movements not only because of how it affects individual clients, but also because of the ways it opens up future pathways for advocacy and activism. The Cricket Hollow Zoo campaign accomplished this in a number of ways. As described above, the precedent established in the ESA litigation has created new bases for litigation against roadside zoos and the opportunities such litigation provides for public outreach and education. The nuisance litigation has also laid the groundwork for activists in future cases to articulate creative interpretations of the anticruelty laws in ways that expand the legal conception of what counts as cruelty, hold institutional abusers accountable, and challenge governmental inaction. The intervention litigation established the possibility of participation in disputes that were previously conceived of as private matters between regulated exhibitors and the USDA. Each of these cases thus created new opportunities for framing, empowerment, and participation.

C. Evaluating the Drawbacks of Litigation

As the preceding discussion shows, litigation has the potential to deliver significant victories for social movements. But critics' concerns about the limitations of litigation also manifested in the Cricket Hollow Zoo litigation, including problems with implementation, the expense of litigation, and the risks of cooptation. These drawbacks can and should inform choices about the strategic use of litigation. However, by themselves, they do not refute the potential value of litigation as part of multifaceted approaches to social change.

1. Implementation Gaps

According to critics, one of the chief problems with litigation is the difficulty of implementing judicial decisions against recalcitrant defendants.[366] Progressive outcomes are often undermined by defendants' efforts to circumvent judgments and by judicial inability or unwillingness to adequately enforce their orders.[367]

The Cricket Hollow Zoo litigation illustrates some of these problems. First, in the ESA case, the district court allowed the Sellners to decide where to send

363. *Id.*

364. Herbert A. Eastman, *Speaking Truth to Power The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 766 (1995).

365. *Id.* at 863.

366. ROSENBERG, *supra* note 64, at 15.

367. SCHEINGOLD, *supra* note 63, at 130.

the tigers and lemurs, even though their mistreatment of the animals violated federal law.[368] The Sellners chose to send the animals to other zoos rather than to the sanctuaries the plaintiffs had fought for. Second, after the state trial court issued its decision in the nuisance case, the Sellners removed nearly one hundred animals from the zoo before the rescue team could seize them.[369] ALDF attorney Amanda Howell describes the partial circumvention of the judgment in the nuisance case as her biggest disappointment: "That's maybe why I'm of two minds about some of these things, because we did everything right. This went the exact, perfect way that you could hope for in this type of case, and I still feel like I failed a lot of the animals."[370]

These instances illustrate the frustrations of litigation and the ways that gaps in implementation and enforcement may compromise judgments. Such limitations must be part of the evaluation of litigation's efficacy. But they do not entirely undercut the value of litigation, as this campaign illustrates. In the ESA case, although the material outcome for the tigers and lemurs was compromised, the new facilities were at least marginal improvements over the Cricket Hollow Zoo, and, as discussed above, the precedential value of the case has helped save dozens of other animals. Moreover, in other ESA cases, courts have not allowed the defendants to choose the animals' new home, indicating that at least this particular implementation failure is not the norm.[371] In the nuisance case, the Sellners' circumvention of the judgment had tragic consequences for the hundred animals who missed their chance for lives at sanctuaries. But the fact that it would have been *better* to save five hundred animals does not invalidate the significance of liberating the four hundred animals who did escape their inhumane captivity at the Cricket Hollow Zoo. In short, implementation gaps compromise litigation's efficacy in ways that movements should factor into their decision-making, but they do not render litigation entirely ineffective.

2. Resource Diversion

The Cricket Hollow Zoo litigation campaign—which comprised six lawsuits over more than seven years, with two full trials, extensive expert witness testimony, and several logistically complicated rescues of hundreds of wild animals—consumed extensive resources. Although ALDF was able to mobilize some pro bono resources, it spent a tremendous amount of staff time and money on the campaign. Are critics correct that the resources allocated to all of this

368. Kuehl I, 161 F. Supp. 3d 678, 719 (N.D. Iowa 2016).

369. Philip Joens, *Mountain Lions, Grizzly Bears Among 110 Animals Missing from Iowa Roadside Zoo, Group Says*, DES MOINES REG. (Jan. 9, 2020), https://www.desmoinesregister.com/story/news/2020/01/09/cricket-hollow-animal-park-animals-missing-iowa-roadside-zoo-animal-legal-defense-fund-claims/4420426002/.

370. Interview with Amanda Howell, Senior Staff Att'y, Animal Legal Def. Fund (Apr. 28, 2021).

371. *See, e.g.*, People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, Inc., 424 F. Supp. 3d 404, 434 (D. Md. 2019), *aff'd*, 843 F. App'x 493 (4th Cir. 2021).

litigation would have been better spent on other approaches? There are a number of problems with this argument.

First, the argument that litigation inefficiently consumes movement resources presumes those resources are fungible across tactics, that money spent on litigation could be spent on organizing or outreach. But, of course, there is no singular movement bank account from which to draw; each social movement organization acquires its own resources through fundraising and allocates them through budgeting. Resources spent on litigation are not zero-sum with resources spent on mobilization or public education across the movement. For organizations like ALDF, which are entirely committed to law reform approaches, allocating resources to litigation increases their capacity to mobilize resources from institutional and individual donors who might not otherwise support animal nonprofits at all.[372] Some of ALDF's donors, for example, donate to the organization precisely because they want to support law reform approaches, including lawsuits.[373] It is certainly likely that at least some individual donors donate to litigation organizations instead of to protest groups, but in many cases, donors' financial support for legal organizations does not draw funds away from non-legal groups.[374] To say that those resources should be spent on other movement tactics is to presume that those resources are already in hand, when in fact the reason they wind up with groups like ALDF is because the law reform strategies of those groups appeal to some donors.[375] In this way, litigation helps mobilize resources that might not otherwise be available to the cause.

Second, the resource-diversion argument frames litigation as antagonistic with alternative methods of social change. However, as the present case study demonstrates, litigation can provide a platform for other organizing efforts. The ESA and nuisance cases, for example, garnered significant publicity, amplifying movement messages against roadside zoos. Other instances of captive wildlife litigation, especially that against Tim Stark and Jeff Lowe, have interfaced with the popular interest in *Tiger King* to create significant public and governmental interest in inhumane captivity. As McCann and Silverstein note, cause lawyers have "deployed litigation and legal discourse resourcefully within the context of broad-based movement campaigns and with an eye toward tactical

372. Email from Joyce Tischler, Founder, Animal Legal Def. Fund, to author (July 13, 2021) (on file with author).

373. *Id.*

374. *Id.*

375. There are well-founded concerns that donors may unduly influence the tactics and strategies of social movements. *See, e.g.*, Megan Ming Francis, *The Price of Civil Rights Black Lives, White Funding, and Movement Capture*, 53 L. & SOC'Y 275 (2019). It is therefore important for social movement organizations, especially ones focused on specialized litigation, to guard against the risk of movement capture and to prioritize their accountability to the social movement itself over their accountability to donors and funders. Organizations should prioritize strategic objectives that are responsive to the needs of the constituent communities, rather than conform their strategies to the funding priorities of foundations. Strategic litigation that accomplishes movement goals may be an effective means of mobilizing foundation resources, but it should not be pursued solely for that purpose.

coordination."[376] As the Cricket Hollow Zoo campaign illustrates, litigation can bolster rather than compromise other social movement tactics.

Finally, for the resource-diversion claim to categorically militate against litigation, it would need to demonstrate that alternative methods of social change are always more effective at achieving social movements' goals than litigation. In many cases, organizing, agitation, and activism *will* be more effective than litigation, which counsels in favor of carefully assessing which tool to use in each case.[377] Nevertheless, the Cricket Hollow Zoo campaign illustrates that, at least in some cases, litigation may be the last and best hope for activists. The Kuehl sisters engaged in public education, state and local legislative advocacy, and regulatory advocacy without success before resorting to litigation.[378] Lisa describes the turn to litigation:

> We were pissed! I mean, we were so angry of the belittling we got from the state ag department to the Sheriff to other people. You know, you get to the point where you're just fighting mad. And so, for me, it was an easy decision. It's like, I'm going to go for it, because those animals need help, and this is the only door that we see open right now to getting them that help.[379]

As Lisa concluded, while other forms of activism are important tools for social movements, litigation may be effective in contexts where other methods are not.

Although the Cricket Hollow Zoo campaign was expensive in human and financial terms, there is no evidence that it compromised other, more effective approaches to social change. On the contrary, by creating a platform for raising public awareness about inhumane captivity, it facilitated broader conversations beyond the litigation and accomplished the goal of liberating animals and closing the facility where other means of agitation had not.

3. Cooptation

Perhaps the most significant danger of litigation is its potential to coopt social movements by mistranslating their grievances, deradicalizing their demands, professionalizing their demeanors, and legitimating the legal system as a whole.[380] Public interest lawyers often have to contort the moral claims of social movements to fit them into existent legal frameworks.[381] This process is fraught with danger, as lawyers must recast the problem and its proposed solution in terms

376. McCann & Silverstein, *supra* note 16, at 287.

377. Betty Hung, *Movement Lawyering As Rebellious Lawyering Advocating with Humility, Love and Courage*, 23 CLINICAL L. REV. 663, 665 (2017) ("Rebellious lawyering from a place of humility entails recognizing that legal strategies are but one of multiple strategies that can be implemented to achieve social change. Depending on the context and the goals of a strategic campaign, differing strategies and tactics will be most effective.").

378. *See infra* Part III(B).

379. Interview with Lisa Kuehl (May 3, 2021).

380. *See generally* Albiston, *supra* note 87.

381. Brown-Nagin, *supra* note 85, at 1509.

recognized by the legal system. In the case of animal protection litigation, lawyers may be required to adopt the language and ideology of the legal system's limited conception of animals, namely, the idea that humans have a right to use and exploit animals as long as their suffering is not gratuitous or excessive. By framing the problems at the Cricket Hollow Zoo in legal terms, did the Cricket Hollow Zoo campaign contribute to the deradicalization of the movement and legitimate the system of exploitation it sought to challenge?

Gary Francione has criticized animal lawyers for betraying the philosophy of animal rights in their legal campaigns. According to Francione, animal legal organizations like ALDF, PETA, and the Humane Society of the United States have embraced a "new welfarism" that targets only gratuitous, socially marginal, and economically inefficient forms of animal suffering, leaving the foundation of animal use unchallenged and assuaging public concerns about our ethical obligations to animals.[382] Instead, Francione advocates an "abolitionist" approach, in which advocates focus on abolishing animals' property status and their use by humans rather than trying to improve their welfare within exploitative conditions.[383] This approach eschews welfarist reform, instead advocating "nonviolent vegan education" to build popular support for animal rights.[384]

Such critics of animal welfarist reform might argue that by focusing on extreme cases of animal neglect against wild animals at the Cricket Hollow Zoo, the campaign shifted the focus away from the more fundamental moral core of animal rights, which rejects humans' entitlement to imprison and exhibit animals altogether. The litigation campaign's focus on the *substandard* conditions at the Cricket Hollow Zoo may have legitimated the idea that *standard* conditions at "good" zoos are morally acceptable, despite the fact that they confine animals and deny them their autonomy.[385] By using existing laws and causes of action, the very act of litigation necessitated framing grievances in ways that legitimated the anthropocentrism of the welfarist system. The ESA, for example, applies only to listed species, requiring the ESA litigation to implicitly privilege endangered animals over non-endangered ones, contrary to some animal rights theories that endorse moral equality among rights-holding animals.[386] Although the nuisance action did not distinguish among animals, it was nevertheless legally dependent

382. GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 220–21 (1996).

383. *See generally* FRANCIONE, ANIMALS AS PERSONS, *supra* note 35. For a critique of Francione's framing of his position as "abolitionist," see Claire Jean Kim, *Abolition*, *in* CRITICAL TERMS FOR ANIMAL STUDIES 15, 19-22 (Lori Gruen ed., 2018).

384. Gary Francione, *The Abolition of Animal Exploitation*, *in* FRANCIONE & GARNER, *supra* note 35, at 64–65.

385. *See, e.g.*, Gary L. Francione, *Why Welfare Reform Campaigns and Single-Issue Campaigns* Necessarily *Promote Animal Exploitation*, ABOLITIONIST APPROACH (Mar. 19, 2016), https://www.abolitionistapproach.com/14542-2/.

386. *See* REGAN, *supra* note 30, at 359. *But see* Philip Cafaro & Richard Primack, *Species Extinction is a Great Moral Wrong*, 170 BIOLOGICAL CONSERVATION 1, 2 (2014).

on an underlying violation of the anticruelty law.[387] Critics have argued that the anticruelty laws, by exempting routine uses of animals and focusing on "unnecessary" suffering, legitimate the anthropocentric assumption that humans are entitled to use animals for our ends, subject to limits on irrational cruelty.[388] By using existing laws and causes of action, animal lawyers were forced to frame harms in potentially compromised and deradicalized ways.

This dilemma is not unique to the animal rights movement. Just as Francione has criticized animal welfare reform as legitimating animal exploitation, critical legal scholars like Karl Klare and Duncan Kennedy have argued that labor law, to take just one example, tamed the power of workers' movements against capitalism.[389] Critical analysis of law reform has long pitted a liberal reform orientation against a radical, revolutionary orientation.[390] Across social movements, a fundamental tension haunts reform efforts: when should movements use the tools at hand to fight back against exploitation, and when should they refrain from doing so for fear of legitimating the structures that undergird the exploitation in the first place?[391]

Critiques of cooptation and legitimation are important correctives to the legal liberalism that puts excessive faith in the capacity of lawyers and litigation to fundamentally transform society. But in the face of pervasive suffering and injustice, sustained inaction is not an option. The challenge is to discern what will help and what will not.

One significant challenge for critics of incremental legal reform is articulating an alternative strategy that would avoid the ways in which reformist litigation purportedly fails. As Orly Lobel and Scott Cummings have convincingly argued, those who valorize extralegal activism while denigrating litigation have not shown how these alternatives avoid the same pitfalls that undermine litigation.[392] As Lobel argues, "it is the act of engagement, not law, that holds the risks of cooptation and the politics of compromise."[393] Even without litigation, social movements must confront questions about their *efficacy* (as they try to generate new social norms that clash with long-established norms and ossified structures of power), their *accountability* to the interests of their constituents (especially as organizations grow), and their *cooptability* (as non-legal approaches become prone to the same kinds of appropriation, fragmentation,

387. Iowa Code § 717B.3.

388. *See* Darian M. Ibrahim, *The Anticruelty Statute A Study in Animal Welfare*, 1 J. ANIMAL L. & ETHICS 175, 176 (2006).

389. *See, e.g.*, Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997).

390. *See, e.g.*, Peter Gabel & Paul Harris, *Building Power and Breaking Images Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375 (1983).

391. *See* Albiston, *supra* note 87, at 77.

392. *See* Lobel, *supra* note 66, at 974; Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987, 1987–1988 (2017).

393. Lobel, *supra* note 66, at 977.

external influence, and backlash that critics charge).[394] Certainly, there is no virtue in pursuing a failing strategy, and critics are right to raise concerns about litigation. But where all paths to justice are dangerous, the task of social movement actors is to be reflective and context-specific in choosing tactics and strategies.

In the context of the animal protection movement, the very idea of animal liberation challenges human domination and thereby threatens ideologies embraced by most of the human population and major sectors of the global economy. This makes concerns about efficacy and cooptation inevitable regardless of the methods adopted by the movement.[395] The case study here suggests that, at least in some instances, litigation campaigns are effective tools for accomplishing the goals of social movements (in this case, the animal protection movement's goals of reducing animal suffering, empowering individual animals to flourish, and raising public consciousness), including when non-litigation tools like grassroots organizing and legislative advocacy fail on their own to accomplish movement ends. The key is finding ways to engage litigation instrumentally without it becoming determinative of a movement's identity.[396]

Social movements can mitigate the risks of cooptation and legitimation by adopting multifaceted, pluralistic approaches to social change, of which litigation is only one part. Cummings argues that a hallmark of movement lawyering is a commitment to "integrated advocacy," which "flexibly coordinat[es] organizational and tactical resources across different institutional spaces—some within formal lawmaking arenas and some outside—to achieve short-term policy reform and long-term cultural and social change."[397] Working in tandem with other social movement actors can help ensure effective social transformation and prevent the framing of litigation grievances in overly conservative and legalistic terms by synchronizing litigation with political action, grassroots mobilization, and public education.[398] Where litigation campaigns are not the sole, or even the dominant, voice of movement grievances, alternative forms of communication that more authentically express the movement's values may take the lead.

Prior studies of the animal protection movement and its use of litigation have found it to be sufficiently attuned to the limitations and risks of litigation and the need to complement it with political, social, and cultural strategies for change.[399] Silverstein's study of animal protection lawyers in the early 1990s found "they tended to be highly circumspect, critical, and strategically sophisticated about the pitfalls of legal action, the 'liberal' biases of legal norms,

394. Cummings, *supra* note 392, at 1987–88, 1991–92.

395. *See* WILL POTTER, GREEN IS THE NEW RED 263 (2011) ("The animal rights and environmental movements are seen . . . as threats to civilization itself.").

396. *See* Brown-Nagin, *supra* note 85, at 1511.

397. Cummings, *supra* note 57, at 1653.

398. *See id.* at 1704.

399. *See* SILVERSTEIN, *supra* note 16, at 186.

and the imperatives of effective political struggle."[400] Silverstein also found that animal activists were not blinkered by the promises of litigation, nor did they allow the terms of litigation to excessively influence their view of social change.[401] As such, they "reconstruct[ed] litigation in strategic terms."[402] My interviews with the activists and attorneys involved in the Cricket Hollow Zoo campaign found this same skepticism towards naïve visions of law and social change. For example, Christopher Berry, a managing attorney at ALDF and a lead attorney on the intervention case, recognizes what he calls the "allure" of the "heroic view of impact litigation," but nevertheless remains strategically pluralistic, believing that successful litigation "reap[s] what's been sown [by] all the other advocacy that came before it."[403] Amanda Howell, a senior staff attorney at ALDF and a lead attorney in the nuisance case, took a similar perspective, noting that litigation "works in concert with" other movement tactics, including educational approaches aimed at changing public consciousness.[404] In the campaign against roadside zoos, the Cricket Hollow Zoo litigation (and the cases that followed it) adopted this multifaceted, integrated approach. At the same time that lawyers were litigating cases to rescue animals and close facilities, organizations were raising public awareness about the issue,[405] lobbying for federal legislation,[406] and organizing protests at roadside zoos.[407]

In sum, the Cricket Hollow Zoo litigation campaign succeeded, in court and out of court, because the litigants and lawyers engaged in litigation strategically, cognizant of how it could materially benefit the animals at the zoo, but also attuned to the need to integrate litigation with a broader strategy for challenging the exploitation of captive wild animals.

CONCLUSION

The campaign to close the Cricket Hollow Zoo demonstrates that litigation can significantly benefit social movements and the communities they serve, notwithstanding important critiques of its efficacy. Several lessons for social movements arise from this analysis.

First, this case study augments the analysis of the efficacy of social movement litigation to include the lived experiences and material conditions of

400. McCann & Silverstein, *supra* note 16, at 266.

401. *See* SILVERSTEIN, *supra* note 16, at 194.

402. *Id.*

403. Interview with Christopher Berry, Managing Att'y, Animal Legal Def. Fund (Apr. 20, 2021).

404. Interview with Amanda Howell, Senior Staff Att'y, Animal Legal Def. Fund (Apr. 28, 2021).

405. *Roadside Zoos*, Animal Legal Def. Fund, https://aldf.org/issue/roadside-zoos/ (last visited July 27, 2021); *Roadside Zoos and Other Captive-Animal Displays*, PETA, https://www.peta.org/issues/animals-in-entertainment/zoos-pseudo-sanctuaries/ (last visited July 27, 2021).

406. *Big Cat Public Safety Act (Federal)*, ANIMAL LEGAL DEF. FUND, https://aldf.org/project/big-cat-public-safety-act/ (last updated Dec. 20, 2022).

407. Press Release, PETA, Protesters to Descend on Decrepit Roadside Zoo (Sept. 14, 2018), https://www.peta.org/media/news-releases/protesters-to-descend-on-decrepit-roadside-zoo/.

exploited individuals and communities more directly. This is a helpful supplement to the existing literature's justified but incomplete focus on significant nationwide policy reform and movement-wide mobilization effects. In liberating more than four hundred individuals from lifetimes of suffering, the Cricket Hollow Zoo campaign illuminates how litigation remains a potentially effective means of changing power relationships through judicial decisions that dramatically change material conditions. Where litigation results in a judgment that changes the legal relationships of the parties, it has the potential to change the experiential lifeworlds of suffering individuals.

Second, this case study shows the continuing importance of impact litigation in securing precedent that expands legal protections and amplifies the material benefits of litigation. *Kuehl I* and the cases that followed it used creative interpretation to expand the substantive protections of federal law to new contexts, including the subjection of wild animals to unsanitary conditions, social isolation, maternal separation, public handling, and the lack of veterinary care, none of which had been previously recognized as illegal under the ESA. The spread of this precedent has magnified the material benefits of litigation.

Third, this case study confirms litigation's indirect, extra-juridical benefits for social movements. The campaign garnered significant media attention to the Cricket Hollow Zoo in particular and roadside zoos in general, while also invigorating and empowering activists like Tracey and Lisa Kuehl. Two underappreciated elements of public outreach in litigation campaigns amplify these benefits: the importance of including positive visions of flourishing and appealing to the affective and emotional dimensions of injustice.

Finally, the case study adds more nuance to the complicated question of when social movement litigation is worth its costs. This Article acknowledges the important critiques of litigation, including skepticism about its ability to deliver sweeping change, the ways it may trade off with other forms of activism, and the risks of cooptation that it poses to movements. But the Cricket Hollow Zoo campaign suggests how movements may take advantage of the material benefits of litigation while remaining circumspect about the promises of legal liberalism. It also offers support for the efficacy of litigation as part of a multifaceted, integrated approach to social change.

To be sure, the problems confronting oppressed communities—including animals—are too big to be fixed by judicial decree. Exploitation is a social phenomenon undergirded by deep material and ideological structures that cannot be dismantled without extensive mobilization, disruption, agitation, debate, and dialogue. But litigation, rather than being inherently ineffective and counterproductive, has the potential to yield progress when strategically

deployed by activists and social movements that are wary, but not fatalistic, about using the legal system as part of their struggles for liberation.